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No. 92-___

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling or packaging of pesticides.

2. Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims *not* based on inadequate labeling or packaging of pesticides.

3. Whether Congress intended FIFRA to preempt state common law tort claims even when the Environmental Protection Agency (EPA) registered a product and approved its label on the basis of inaccurate information submitted by the manufacturer.

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[1] Petitioners, Minas H. Papas and Ollie M. Papas, his wife, appeared as Plaintiffs/Appellants below. Respondents, The Upjohn Company and Zoecon Corporation, appeared as Defendants/Appellees below.

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Southern Colo. Farms, Inc. v. Green,
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7 U.S.C. § 136a(f)(2) 21

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40 C.F.R. § 152.50(e) 4, 23

40 C.F.R. § 152.130(b) & (c) 4, 23

40 C.F.R. § 152.132(d)(5) 4, 23

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Other Authority:

Office of Inspector General, *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992) 5, 22

U.S. GAO, *Lawn Care Pesticides: Risks Remain Uncertain While Prohibited Safety Claims Continue* (1990) 22

OPINIONS BELOW

The opinion of the Court of Appeals following remand from this Court is reported at 985 F.2d 516 (11th Cir. 1993) and is reproduced in the petitioners' appendix (Pet.App.) at 1a. It is hereinafter referred to as *Papas II*. The judgment is reproduced at Pet.App. 11a. The first opinion of the Court of Appeals is reported at 926 F.2d 1019 (11th Cir. 1991) and is reproduced at Pet.App. 35a. It is hereinafter referred to as *Papas I*. The opinion of the District Court, filed on August 3, 1989, is unreported and is reproduced at Pet.App. 13a.

JURISDICTION

The judgment of the Court of Appeals following remand from this Court was entered on March 8, 1993. *See* Pet.App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

§ 136v. Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

§ 136(p) Label and labeling. --

(1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

This is a diversity action, filed pursuant to 28 U.S.C. § 1332, seeking damages under Florida common law for severe personal injuries suffered by petitioner Minas H. Papas and derivative injuries suffered by his wife. From 1982 through 1986, Mr. Papas administered treatments for dermatological disorders found in dogs housed in the Clay County Humane Society's Animal Shelter. The treatments required physically dipping dogs in a bath containing one of two products, Paramite, a product manufactured by Respondent Zoecon, or Mitaban, a similar product manufactured by the Upjohn Company.[2] Throughout the course of his employment, Mr. Papas was repeatedly and continuously drenched by these products, and inhaled their fumes. In July of 1986, Mr. Papas began displaying symptoms of serious health disorders, was ultimately hospitalized and, in late 1986, was diagnosed as having aplastic anemia/pancytopenia, a debilitating hematological disorder, and declared totally disabled. His condition and symptoms were consistent with a classic case of benzene poisoning.

Zoecon's Paramite product contained, as approximately 70% of its make-up, an aromatic petroleum based hydrocarbon solvent as an inert

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[2] Pursuant to a stipulation between the parties, Petitioners' claims against the Upjohn Company were dismissed with prejudice by the District Court on August 7, 1992, and the District Court entered judgment on August 11, 1992. Accordingly, the only claims remaining for disposition in this appeal are Petitioners' claims against Zoecon Corporation.

ingredient. The solvent utilized in Paramite (known as "Sure-Sol 190") typically consisted of 1/10 of 1% (0.10%) benzene by weight. Benzene is a highly toxic substance which has been placed on the EPA's list of inerts of toxicological concern, which are subject to data requirements.

Paramite's label did not inform purchasers or end users, such as Mr. Papas, that the product contained benzene, nor was there any warning of the potential for the development of diseases such as aplastic anemia/pancytopenia, which can result from long-term exposure to benzene. In addition, even though Zoecon registered Paramite with the EPA, according to the evidence of record, Zoecon never informed the EPA that Paramite contained benzene or that, because of the presence of the benzene, the product posed a health risk to humans.

Under EPA regulations promulgated pursuant to FIFRA, manufacturers seeking to register pesticides have wide latitude to decide the language of pesticide labels. Manufacturers draft their own labels which they submit to the EPA for acceptance. 40 C.F.R. § 152.50(e). Manufacturers may apply at any time to have the EPA accept changes in previously accepted labels. *See* 40 C.F.R. § 152.44. In many cases, a manufacturer need only notify the EPA that it is making the revision. 40 C.F.R. § 152.46(a). Other revisions require no notification at all. 40 C.F.R. § 152.46; § 152.130(b) & (c); and § 152.132(d)(5). In this case, however, none of those regulatory procedures provided any protection to Mr. Papas and his wife, in part, because Zoecon did not inform the

EPA of the presence or quantities of benzene contained in its products.[3]

In February, 1988, the Papases filed suit against Zoecon alleging separate counts for negligence, strict liability, and breach of implied warranty under Florida common law. Each count included allegations that Zoecon, among other things, failed to warn that Paramite contained chemical solvents (benzene) which caused aplastic anemia/pancytopenia and to inform users to take appropriate precautionary measures. The complaint also alleged that Zoecon failed to take numerous other reasonable steps and improperly designed, manufactured, and marketed Paramite.[4]

On April 10, 1989, Zoecon moved for partial summary judgment on the ground that FIFRA preempts all of the Papases' claims to the extent that

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[3] The base formulation of Zoecon's Paramite product had previously been registered as a pesticide under FIFRA prior to the amendment of the statute and creation of the EPA in 1972. When FIFRA was amended in 1972, it allowed for products previously registered, such as the base formulation of Paramite, to be registered by the EPA with relatively little regulatory review of the product and its labels. *See, e.g.* Office of the Inspector General, *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992) at ii ("Due to certain provisions of FIFRA, pesticides were registered without requiring a complete set of toxicity studies."). That is what happened with Paramite.

[4] The Papases' complaint did not allege that Zoecon had failed to notify the EPA that Paramite contained benzene when it submitted Paramite's label for approval because, among other things, the Papases were not aware of that fact at the time they filed suit. Nevertheless, the Papases believe and seek to prove that, if Zoecon had informed the EPA of the presence of benzene in Paramite and had adequately warned about the benzene on Paramite's label, the Papases would not have been injured.

they are predicated upon Zoecon's failure to warn. Even though Zoecon never informed the EPA of the presence of benzene in its product, Zoecon contended that the EPA's registration of the product under FIFRA shields Zoecon from common law liability.

The District Court entered partial summary judgment in Zoecon's favor, and found that FIFRA expressly preempts the claims to the extent they are predicated upon inadequate warnings and labeling. Pet.App. 25a-26a. The Papases took an interlocutory appeal from the District Court's ruling pursuant to a 28 U.S.C. § 1292(b) certification. On February 28, 1991, the Court of Appeals for the Eleventh Circuit held that FIFRA impliedly preempts the Papases' claims to the extent that they are based upon inadequate warnings and labeling. Pet.App. 37a. In this initial ruling, the Court of Appeals reviewed FIFRA's statutory language and regulations promulgated by the EPA under FIFRA and declined to find that petitioners' common law claims are expressly preempted. Pet.App. 46a. "[M]indful that Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," the court stated, "we admit to a little uncertainty and pass over the question of express preemption." Pet.App. 45a.

On June 24, 1992, this Court vacated the Court of Appeals' opinion and remanded the case for further consideration in light of this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). Pet.App. 54a. On August 4, 1992, the Court of Appeals ordered the parties to submit supplemental

briefs commenting on the significance of *Cipollone*. Pet.App. 56a.

The Papases argued in their supplemental brief that *Cipollone* re-affirmed that express preemption provisions, such as the one found in FIFRA, must be construed narrowly and in light of a strong presumption against preemption. The Papases then demonstrated that FIFRA's express preemption provision, § 136v(b), narrowly read in light of the presumption against preemption, simply does not apply to any common law claims. In addition, the Papases argued that, even if § 136v(b) can be read to apply to some common law claims, it does not preempt any claims in this case because of Zoecon's failure to provide the EPA with critical information about the risks of its product. The Papases also argued that FIFRA cannot preempt those warning claims based on allegations that are unrelated to "labeling and packaging," the only areas specifically mentioned in FIFRA's preemption provision. Finally, the Papases argued that, in light of this Court's reasoning with respect to express warranties in *Cipollone*, the Papases' implied warranty claim is not preempted.

Reconsidering the case on remand from this Court in light of *Cipollone*, the Court of Appeals held, on March 8, 1993, that FIFRA expressly preempts all claims based on failure to warn theories. Pet.App. 10a. The Eleventh Circuit specifically rejected the petitioners' contention that Zoecon could be held liable because of its misrepresentations to the EPA. Pet.App. 7a. The Eleventh Circuit also ruled that the

petitioners' claims for failure to warn in literature or postings beyond the label (such as point-of-sale signs or consumer notices) are expressly preempted by FIFRA. Pet.App. 8a. Finally, the Court of Appeals rejected the Papases' contention that their implied warranty claim must survive. Pet.App. 10a.

REASONS FOR GRANTING THE WRIT

For 14 years after FIFRA was amended in 1972, no reported decision suggested that FIFRA's preemption provision prevented pesticide poisoning victims from pursuing any state common law claims. Indeed, in the only reported decision during that period on the subject, the D.C. Circuit held that FIFRA does *not* preempt common law claims. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). During those years, untold numbers of pesticide poisoning victims, who are afforded no compensation under FIFRA, successfully sought and obtained compensation from pesticide manufacturers. These damage actions also spurred the manufacturers to improve their labels.

In 1986, the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, (1987), *after remand*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in part*, 112 S.Ct. 2608 (1992), finding all inadequate labeling claims brought by cigarette smokers after 1965 impliedly preempted. Despite the myriad differences between cigarette legislation and FIFRA (including the fact that the former dictates the language of cigarette labels, while

the latter leaves labeling decisions to pesticide manufacturers), the pesticide manufacturers started urging the courts to apply the Third Circuit's logic to FIFRA.

Relying on the Third Circuit's decision in *Cipollone* or on its progeny, and despite the lack of congressional action finding fault with *Ferebee*, a number of trial courts throughout the nation began adopting the pesticide manufacturers' arguments. In 1991, the Eleventh Circuit, in *Papas I*, became the first appellate court to find common law claims impliedly preempted by FIFRA. Prior to this Court's decision last term in *Cipollone*, several other appellate and trial courts followed suit. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.)(*Arkansas-Platte I*), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S.Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir. 1993)(*Arkansas-Platte II*), *petition for cert. filed* (May 10, 1993). Shortly after deciding *Cipollone*, and recognizing that its analysis in that case would shape the resolution of FIFRA preemption, this Court vacated the Eleventh Circuit's decision in *Papas I*, *supra*, and the Tenth Circuit's decision in *Arkansas-Platte I*, *supra*, and remanded them for reconsideration.

While many hoped that *Cipollone* would resolve the issue of FIFRA preemption, the confusion and conflict among the lower courts remains. This muddled and unjust state of the law should no longer be countenanced. This Court should grant *certiorari* on this issue.

I. There Is A Deep Difference Of Opinion Among The Lower Courts Concerning FIFRA Preemption.

There are several different splits among the lower courts concerning FIFRA preemption. The breadth of the preemption decision of the Eleventh Circuit is unprecedented and presents all of the key FIFRA preemption issues on which the lower courts have split.

A. The Lower Federal And State Courts Are Split On Whether FIFRA Preempts Common Law Inadequate Labeling Claims.

Courts before and after *Cipollone* have been divided over whether FIFRA preempts state common law claims of inadequate labeling. Without guidance from this Court, the currently confused state of the law will continue.

1. Before *Cipollone*.

Before this Court issued its opinion in *Cipollone*, five appellate courts ruled on whether FIFRA preempts state common law tort actions. The only two that squarely considered the issue both found that FIFRA does not expressly preempt *any* common law claims. *Ferebee, supra*, 736 F.2d at 1529; *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).[5] These two courts also found no implied preemption.

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[5] Notably, the Eleventh Circuit, in the initial appeal of this case, admitted to "a little uncertainty" on the express preemption issue. Pet.App. 45a.

The other three appellate courts disagreed, however, following the now-rejected reasoning of the Third Circuit's decision in Cipollone, or its progeny, and finding implied preemption.[6]

Lower court opinions showed a similar conflict. After the Third Circuit's decision in *Cipollone*, federal district courts variously held state common law inadequate warning claims expressly preempted,[7] impliedly preempted,[8] and not preempted at all.[9] The

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[6] *Papas I, supra*; *Arkansas Platte II, supra*; and *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992)(using classic implied preemption terminology, the Fourth Circuit held failure to warn claims preempted because they "conflict" with FIFRA).

[7] *See, e.g., Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

[8] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[9] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339 (D. Mont. 1991), *aff'd on other grounds*, No. 91-36024 (9th Cir. May 10, 1993); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704

(continued...)

numerous opinions from lower state courts on this preemption issue likewise showed a widespread conflict.[10] Simply put, the courts were bedeviled by the FIFRA preemption question before this Court's decision in *Cipollone*. They continue to be baffled today.

2. After *Cipollone*.

At least seventeen state and federal courts have addressed the issue of whether FIFRA preempts state common law claims of inadequate labeling since this Court's decision in *Cipollone*. Using varying analyses, some courts ruled that claims of inadequate labeling are not preempted,[11] others found varying degrees of

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[9](...continued)
F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986).

[10] Cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach Cty. June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach Cty. Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent Cty. May 5, 1989). Cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991); *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist. Ct. Saguache Cty. June 7, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton Cty. May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery Cty. May 17, 1991).

[11] *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258 (E.D. Tex. 1993); *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992).

express preemption,[12] and still others found implied preemption.[13] Included among these opinions are six post-*Cipollone* appellate court decisions: *Shaw v. Dow Brands, supra* (7th Cir.); *Arkansas-Platte, supra* (10th Cir.); *Davidson, supra* (Nevada Supreme Court); *Yowell, supra*, (Missouri Court of Appeals); *Brennan, supra* (Florida Court of Appeals); and the instant case.[14]

The existence of seventeen court opinions on this question in less than a year, which employ a variety of

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[12] *Shaw v. Dow Brands*, No. 92-2323 (7th Cir. May 18, 1993); *Papas II, supra*; *Arkansas-Platte II, supra*; *Brennan v. Dow Chemical Co.*, 613 So.2d 131 (Fla. Ct. App. 1993)(preemption of failure to warn but not warranty claims); *Levesque v. Miles Inc.*, 816 F.Supp. 61 (D.N.H. 1993); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992)(only as to affixed labels); *Casper v. E.I. Dupont De Nemours*, 806 F. Supp. 903 (E.D. Wash. 1992); *King v. E.I. Dupont De Nemours*, 806 F.Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); and *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992).

[13] *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 123 L.Ed.2d 650 (1993); *Yowell v. Chevron Chemical Co.*, 836 S.W. 2d 62 (Mo. Ct. App. July 13, 1992); *Jordan v. Southern Wood Piedmont Company*, 805 F. Supp. 1575 (S.D. Ga. 1992); *Burge v. Jones*, CV B-92-022 (S.D. Tex. Nov. 18, 1992); *Worm, supra* (on remand to district court, implied preemption of all failure to warn claims); and *Bander v. Southern States Cooperative, Inc.*, No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992).

[14] In addition, the issue is currently pending before three federal courts of appeals: *King, supra* (express preemption of inadequate labeling claims); *Worm, supra*, (implied preemption of some inadequate labeling claims); *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, No. 90-CV-83 (W.D. Mich. October 1, 1991), *appeal filed*, Nos. 92-2402; 92-2403 (6th Cir. Oct. 15, 1992)(no preemption of failure to warn claims not involving the label or labeling).

analyses and reach different conclusions, shows the dire state of the law in this area. The confusion has already gone on too long. Only this Court can eliminate it.

B. The Courts of Appeals Are Split On Whether Warnings That Do Not Accompany The Product Are Preempted.

The far-reaching preemption decision below created a split in the Circuits on whether FIFRA preempts state requirements with respect to warnings that do not accompany the product. According to *Papas II*:

> [A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs.

Pet.App. 8a. Both the Ninth and Second Circuits disagree with the Eleventh Circuit's conclusion concerning the reach of FIFRA's preemption provision.

In *Chemical Specialties Manufacturers Ass'n., Inc. v. Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 113

S.Ct. 80 (1992), the Ninth Circuit concluded that FIFRA does not preempt California's Proposition 65, an Act that requires, among other things, point-of-sale warnings to the consuming public about products that pose a health risk. The court stated:

> FIFRA's definition of labeling cannot encompass every type of written material accompanying the pesticide at any time. If this were true, then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling.

Id. at 946.

Likewise, the Second Circuit in *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2nd Cir. 1989), was asked whether FIFRA preempts New York's Pesticide Notification Program, a set of notification requirements intended to alert and educate the public about the imminent use of pesticides. The court concluded that the provisions do not constitute preempted "labeling" under FIFRA. *Id.* at 120. In so doing, the Court stated that, "Notification requirements such as cover sheets, signs, and newspaper advertisements do not impair the integrity of the FIFRA label.... To hold otherwise would preempt a wide range of state activities which Congress did not subject to the jurisdiction of the EPA." *Id.* at 119-20. *See also Worm, supra*, 970 F.2d at 1307-08 n.2 (FIFRA's labeling provision "would not appear to include general advertising statements not

made in connection with a particular sale" citing *Jorling, supra*) and *Burke, supra*, 797 F. Supp. at 1140 ("If ... warnings to the trade, warnings apart from labels or packaging, limitation on sales to professionals, or other protections falling generally within the ambit of warnings should have been used when the content of the label was fixed by EPA there remains a liability question for the trier of fact.").

Only this Court can resolve the split among the circuits on this point.

C. The Courts Of Appeals Are Split On Whether FIFRA Preempts State Claims Based On The Failure To Provide Federal Regulators With Complete Information.

There is also a split in the circuits on whether FIFRA preempts state common law claims related to the manufacturer's failure to provide the EPA with complete and accurate information. According to *Papas II*, "[I]t is for the EPA Administrator, not a jury, to determine whether labeling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made." Pet.App. 7a. The court went on to conclude that, "We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures." Pet.App. 7a.

The Fourth Circuit in *Worm*, on the other hand, distinguished between a state common law tort that would "impose a labeling requirement inconsistent with those established by FIFRA" and one that would

not. 970 F.2d at 1308. The court stated, "[I]f the state imposes a duty to improve a product or to maintain a label in accordance with the federal standards, no conflict exists and FIFRA does not preempt." *Id.* at 1309. *Accord Burke, supra*, 797 F. Supp. at 1142. *See also Hurley v. Lederlee Laboratories Division of American Cyanamid*, 863 F.2d 1173 (5th Cir. 1988)(if the jury finds a deficiency in the information the manufacturer provided to the federal regulatory agency, the agency's approval of the warning does not preempt an inadequate labeling claim).

Only this Court can resolve this split.

D. The Lower Courts Are Split On Whether FIFRA Preempts Breach Of Warranty Claims.

The Court of Appeals found that FIFRA preempts the Papases' breach of implied warranty claims. Pet.App. 10a. This conclusion conflicts with the post-*Cipollone* holding of the Florida Court of Appeal that "FIFRA does not preempt the breach of warranty claim, since it was a common law claim arising out of a voluntary contractual commitment." *Brennan, supra*, 613 So.2d at 132. Review by this Court is essential to prevent the gross injustice of two different victims located in the same state being treated differently because of where they filed their case.

E. The Unresolved Splits Among The Lower Courts Are Causing Injustice And A Waste Of Resources.

There are several adverse results stemming from the lack of clarity on FIFRA preemption. First, the varied opinions among courts about FIFRA preemption mean that the ability to recover compensation for personal injuries or property damage caused by a pesticide depends on the fortuitous factor of where suit is filed. This is certainly the situation for the Papases. Inadequate labeling claims similar to those raised by the Papases were allowed to proceed in the District of Columbia, Arkansas, Montana, and Texas. Non-"label" warnings like those requested by the Papases were required by states and allowed by the Second and Ninth Circuits. A claim based on the manufacturer's failure to comply with federal standards, similar to the Papases' desire to show that Zoecon failed to provide the EPA with complete and accurate information, was permitted to go forward in the Fourth Circuit. Finally, breach of warranty claims filed in Florida, the state in which the Papases reside and in which the alleged tort occurred, were permitted to go forward. Because the Papases happened to file their case in a federal court in the Eleventh Circuit, however, none of these claims survived.

Second, while there is no dispute that FIFRA preemption must be analyzed in light of this Court's ruling in *Cipollone*, there is a significant dispute about how to apply *Cipollone.* As the review of the decisions above indicates, there are almost as many interpretations of how to apply *Cipollone* as there are

interpreters. This Court will eventually have to resolve the confusion concerning FIFRA preemption. The need for uniform justice compels an immediate resolution of this question.

Third, litigants and courts throughout the country are spending enormous time and resources on disputes over FIFRA's preemptive effect. There is no reason for them to continue spinning their wheels. The instant case presents the issue clearly and without procedural defect. It is also a perfect vehicle for ending the second-guessing about the result this Court would reach because it alleges all the key state common law tort claims. The Court should end the confusion about FIFRA preemption by reviewing this case.

II. The Eleventh Circuit's Reasoning Conflicts With *Cipollone* And, As A Result, Decides An Important Federal Question Incorrectly.

The Eleventh Circuit misapplied *Cipollone* and, therefore, decided an important federal question incorrectly. FIFRA simply does not preempt petitioners' claims.

A. The Eleventh Circuit Failed To Interpret FIFRA's Language Narrowly And Discern Congressional Intent.

Cipollone establishes that: 1) a court's task during preemption analysis is to ascertain Congressional intent; 2) in conducting this analysis, the court is to presume that the historic police powers of the states,

including the states' tort remedies, are not superseded; and 3) the presumption against preemption is rebutted only if preemption is the clear and manifest intent of Congress. *Cipollone, supra,* 112 S.Ct. at 2617. The application of these principles requires a careful statutory analysis which the Eleventh Circuit did not consistently employ. Had the Eleventh Circuit applied these principles properly, it would have found that FIFRA does not preempt any of the Papases' state common law claims.

The statutory analysis called for by *Cipollone* requires a court to read §§ 136v(a) and (b) in conjunction with each other as two parts of a single section. When this is done, it is clear that the reference in subsection (b) to "Such State" points back to a "State" in subsection (a) that is "*regulating*."[15] After reviewing the legislative history of the 1965 Cigarette Act, this Court declared in *Cipollone* that the ordinary meaning of the word "regulate" refers to a state's positive enactments, not a state's common law. 112 S.Ct. at 2619. The plain text and legislative history of FIFRA lead to the same conclusion. FIFRA, therefore, does not preempt state common law tort actions.

Further, a court applying to FIFRA the careful statutory analysis called for in *Cipollone* must focus on what requirements "in addition to or different from" means in § 136v(b). FIFRA's provisions repeatedly point to the desire to protect health and the environment. *See, e.g.,* 7 U.S.C. § 136a(c)(5)(a

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[15] Likewise, § 136v(c) refers to a state that is regulating.

pesticide registrant's label must contain adequate warnings to protect against unreasonable adverse effects on health and the environment). The principle guiding state common law tort theories is the same: protect health and the environment. As such, state common law tort actions do not establish "requirements in addition to or different from" those of FIFRA.

Similarly, FIFRA's provisions concerning misbranding show that the statutory scheme and the state common law scheme neither oppose nor contradict each other; rather, they parallel and complement each other. Under FIFRA, the EPA's acceptance of a pesticide's label does not necessarily mean that all of FIFRA's labeling standards are satisfied. According to the statute, a pesticide is misbranded, *even if the label is approved*, if the label does not contain a warning that is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F)-(G).[16] Further, the EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. at 37,960-61 (Sept. 26, 1984).[17]

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[16] *See* 7 U.S.C. § 136a(f)(2) (the fact that the product was registered with the EPA is no defense to a misbranding charge); § 136d(a)(2) (ongoing obligation to provide the EPA with relevant information).

[17] Indeed, this Court, in *Cipollone*, recognized that, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 112 S.Ct. at 2618. In addition, this Court found that allowing common law claims to go forward does not conflict with a legislative

(continued...)

This Court's ruling in *Cipollone* also requires a review of legislative history to discern legislative intent. The legislative history of the 1972 version of FIFRA does not support the assertion that Congress intended to preempt common law claims when it enacted § 136v(b). *See, e.g.*, S. Rep. No. 838, 92d Cong., 2d Sess. (1972). Moreover, Congress ratified the D.C. Circuit's 1984 finding in *Ferebee, supra*, that § 136v(b) does not preempt common law claims when it extensively revised the statute in 1988.[18] Unlike the 1969 Cigarette Act addressed in *Cipollone*, Congress never altered the language of § 136v(b) to expand FIFRA's preemptive effect.

Further, the wide latitude the EPA gives to pesticide manufacturers to decide the language of

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[17](...continued)
goal of protecting the national economy from nonuniform labeling. *Id.* at 2619. Here, the existence of state common law tort systems enhances EPA's regulatory efforts by providing pesticide manufacturers with an incentive to improve their labels and products. *See, e.g., Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992). This is particularly important because, despite the laudatory goals of federal pesticide regulation, the EPA has not been able to fully review the safety of a large number of pesticides that are currently on the market. *See, e.g.*, U.S. GAO, *Lawn Care Pesticides: Risks Remain Uncertain While Prohibited Safety Claims Continue* (1990) (reporting that 32 of the 34 most widely used lawn care pesticides had not been reassessed for their long-term health risks) and *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613, supra*.

[18] At that time, Congress amended FIFRA's preemption provisions by adding the heading "Uniformity" to § 136v(b). Other than this cosmetic change, however, Congress did not address the preemption issue. Under well-established rules of construction, this non-substantive amendment indicates Congressional ratification of *Ferebee*. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

pesticide labels (particularly compared to the specific labeling commands that Congress gives cigarette manufacturers) confirms that § 136v(b) does not expressly preempt common law labeling claims. Under the FIFRA registration scheme, the drafting of the label is left to the registrant. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). Similarly, it is the registrant who decides that a label change is necessary, who drafts a revised label, and who submits it to the EPA for review. 40 C.F.R. § 152.44. Many label revisions require only EPA notification, not agency approval, 40 C.F.R. § 152.46(a), and some revisions do not require any EPA notification, such as changes in non-mandatory label statements, additions required by other federal laws, or changes in the label format. 40 C.F.R. § 152.46. *See also 40 C.F.R.* §§ 152.130(b) & (c); § 152.132(d)(5). Moreover, because the manufacturer drafts the label, different products containing the same active ingredient, whether manufactured by the same or a different company, may have different labels. *See, e.g., Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991). Thus, unlike the 1965 and 1969 Cigarette Acts, FIFRA does not mandate that all products containing a particular hazardous ingredient carry identical labels.

In sum, a fair reading of the statute in accordance with proper statutory analysis, along with an analysis of the statute's legislative history, lead to the conclusion that, in enacting FIFRA, Congress evinced no intent to preempt any state common law tort actions.

B. The Eleventh Circuit Failed To Conduct The Claim-By-Claim Analysis Required By *Cipollone* To Determine Whether There Is Congressional Intent To Preempt Specific Claims.

Assuming, *arguendo*, that the Eleventh Circuit was correct in concluding that FIFRA does expressly preempt some state common law claims, its next step should have been to evaluate whether FIFRA preempts the specific state common law tort claims at issue in this case. According to the plurality in *Cipollone*: "[W]e must fairly but -- in light of the strong presumption against pre-emption -- narrowly construe the precise language of ... [the provision concerning preemption] and we must look to each of petitioner's common law claims to determine whether it is in fact preempted." 112 S.Ct. at 2621. The analysis the Eleventh Circuit conducted did not meet this rigorous standard.

1. Non-"Label" Warning Claims Are Not Preempted.

Despite the contrary findings of the Ninth Circuit in *Allenby, supra*, and the Second Circuit in *Jorling, supra*, the Eleventh Circuit found no distinction between petitioners' claims concerning inadequate warnings on products' labels and inadequate warnings on material other than the product's label. Pet.App. 8a. In failing to make this distinction, the court did not follow *Cipollone*'s requirement that FIFRA's

statutory language be construed narrowly.[19] 112 S.Ct. at 2621. The proper analysis of a non-"label" claim, according to *Cipollone*, involves asking whether the claim would require the imposition under state law of requirements for labeling or packaging in addition to or different from those required under FIFRA. *Id*. The answer to this question lies in FIFRA's very clear definitions.

Section 136(p) of FIFRA defines "label" and "labeling" as follows:

> (1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --
>
> > (A) accompanying the pesticide or device at any time; or
> >
> > (B) to which reference is made on the label or in literature accompanying the pesticide or device ....

By definition, "label" and "labeling" are not addressed by the Papases' claim that Zoecon failed to warn consumers adequately through point-of-sale signs, consumer notices, and other off-label mechanisms. This non-"label" claim, therefore, cannot be preempted

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[19] *See also Bailey Farms, supra.*

because it cannot require the imposition of requirements for "labeling and packaging" in addition to or different from those required under FIFRA. *See Allenby, supra; Worm, supra*; and *Jorling, supra*.

2. Breach Of Implied Warranty Claims Are Not Preempted.

The Eleventh Circuit also failed to apply correctly the *Cipollone* analysis to petitioners' breach of implied warranty claim. According to the plurality opinion in *Cipollone*, the "requirements" imposed by an express warranty claim are not imposed under state law, but are imposed by the warrantor. 112 S.Ct. at 2622. This reasoning applies equally to implied warranties since implied warranty claims simply recognize that it was the intent of the manufacturer to offer a warranty, albeit not explicitly. *See, e.g., Brennan, supra*, 613 So.2d at 132. The Eleventh Circuit's attempt to distinguish implied warranties as imposed by the state, rather than the warrantor, ignores the fact that the purpose of an implied warranty claim is to hold the manufacturer accountable for a warranty that *it* made.

3. Misrepresentation Claims For Failure To Disclose A Material Fact To Consumers Are Not Preempted.

The Eleventh Circuit's dismissal of petitioners' claim that Zoecon misrepresented Paramite's safety by concealing benzene's presence from consumers further demonstrates the court's failure to apply *Cipollone's* principles correctly. The *Cipollone* Court concluded

that common-law claims for fraud and misrepresentation are not preempted under the 1969 Cigarette Act. In so concluding, it reasoned that these claims are not predicated on a duty "based on smoking and health," "but rather on a more general obligation, -- the duty not to deceive." 112 S.Ct. at 2624.[20] Likewise, the petitioners' claim that respondent owed them a duty not to conceal the presence of benzene in its product is not predicated on a requirement related to "labeling or packaging" but, as in *Cipollone*, on a more general duty not to deceive.[21] It should not be preempted.

4. Misrepresentation Claims Based On A Manufacturer's Failure To Comply With Federal Standards Are Not Preempted.

The decision below is also too broad because it improperly precludes a state cause of action based on the failure to comply with federal standards. Pet.App. 6a-7a. As the Fourth Circuit recognized in *Worm, supra*, 970 F.2d at 1308, FIFRA's preemption provision, § 136v(b), only preempts State-imposed labeling requirements that are "in addition to or different from" those imposed under FIFRA. Thus, even if § 136v(b) can somehow be read to apply to common law claims, it does not preempt common law claims that are wholly consistent with FIFRA's

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[20] *But see* Pet.App. 7a n.2.

[21] Similarly, an affirmative fraud claim, if formally alleged, would not be preempted.

requirements, such as a state cause of action based on the failure to comply with federal standards. *Id.*

Here, the Papases charge that Zoecon failed to inform the EPA that its product contained benzene and that there were safety risks due to benzene's presence. Under FIFRA, Zoecon's omission of significant health and safety information on the product label constitutes misbranding, which the EPA may prosecute. 7 U.S.C. § 136(f)(1)(G). Clearly, a state-imposed duty to maintain a label wholly consistent with FIFRA's misbranding standards requires nothing that is "in addition to or different from" what is already required by FIFRA itself. *Worm, supra,* 970 F.2d at 1309. Therefore, even if the Papases' other common law claims are preempted, a state tort claim predicated on the manufacturer's failure to comply with FIFRA should not be preempted.

III. None Of Petitioners' Claims Are Preempted Because Zoecon Failed To Provide Adequate Information To The EPA.

According to the evidence of record, the EPA did not know that Zoecon's product contained benzene when it registered it and approved its label. The Eleventh Circuit found, however, that the EPA's action still gives Zoecon immunity from liability for Mr. Papas' benzene poisoning. The absurdity and injustice of such a result demonstrates the extreme reach of the Eleventh Circuit's preemption ruling.

A pesticide manufacturer that submits inaccurate or incomplete information to the EPA undermines the

basic integrity of the regulatory scheme. It is inconceivable that Congress could have intended that a company be immune from personal injury or property damage liability in such a situation. To grant such immunity would mean that, if 10,000 people died from exposure to an ingredient that was not disclosed, their families could obtain no compensation for their deaths.

Such a grant of immunity, with its concomitant financial windfall, would *actually encourage* manufacturers to evade the regulatory system. It would make no sense for Congress to establish a regulatory system at all if it were to provide such a gaping, and lucrative, loophole through which manufacturers could slide.[22] This Court should review and reject the Eleventh Circuit's finding to the contrary.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

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[22] In similar circumstances, the Fifth Circuit declined to reach such an absurd result. In *Hurley, supra,* a case arising under the Food, Drug and Cosmetic Act, the court ruled that whether inadequate labeling claims are preempted turns on whether the manufacturer provided the FDA with all the necessary and available information.

Respectfully submitted,

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June 7, 1993

APPENDIX

PAPAS v. UPJOHN CO.

Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs-Appellants

v.

The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.

No.89-3752.

United States Court of Appeals,
Eleventh Circuit

March 8, 1993.

Appeal from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The facts of this case are set out in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991)("Papas I"). We must decide whether, in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), appellants' state law claims against defendant Zoecon Corporation are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA").

Appellants Minas and Ollie Papas brought a diversity action against Zoecon Corporation seeking compensation for injuries Mr. Papas allegedly sustained due to exposure to pesticides manufactured by Zoecon. The Papases' complaint asserted liability based on negligence, strict liability, and breach of an implied warranty of merchantability. Each of those claims was, in whole or in part, a claim of inadequate labeling for alleged dangers arising from exposure to the pesticides. *Papas I*, 926 F.2d at 1020.

In *Papas I*, we reviewed the district court's partial grant of summary judgment in favor of defendants on the labeling claims. We affirmed, holding that "FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling." *Papas I*, 926 F.2d at 1026. We confined our analysis in *Papas I* to the doctrine of implied preemption. *Id.* at 1024. Later, the Supreme Court vacated the judgment in *Papas I* and remanded this case to us for further consideration in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *Papas v. Zoecon Corp.*, ___U.S. ___, 112 S.Ct. 3020,

120 L.Ed.2d 892 (1992). Having looked at *Cipollone*, we conclude that FIFRA expressly preempts the Papases' claims to the extent they are based on inadequate labeling or packaging.

I.

In *Cipollone,* the Supreme Court analyzed, for the claims in that case, the preemptive effect of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 ("the 1965 Act"), and its successor, the Public Health Smoking Act of 1969 ("the 1969 Act"). The Court found no cause to look beyond the express preemption provisions contained in section 5 of the 1965 and 1969 Acts.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indictum of congressional intent with respect to state authority', [citations omitted] 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation .... Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.

505 U.S. at ___, 112 S.Ct. at 2618. The Court then analyzed the pre-emption provisions of the 1965 and 1969 Acts to decide if the provisions expressly preempted the plaintiff's various claims. *Id.*

In the light of *Cipollone,* we will determine FIFRA's preemptive effect on the Papases' claims under the express pre-emption doctrine. Like the statutes at issue in *Cipollone,* FIFRA contains a provision explicitly addressing, and providing a reliable indictum of, state authority.[1] Congress specified the extent to which the states may regulate pesticides in FIFRA's section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered

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[1] *See Papas v. Upjohn Co.,* 926 F.2d 1019, 1022-24 (11th Cir. 1991), for our analysis of FIFRA's legislative history and regulatory scheme.

> pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator ....

7 U.S.C.A. § 136v (West 1980 & Supp.1992). To determine FIFRA's pre-emption of the Papases' claims we will "only identify the domain expressly preempted" by FIFRA section 136v. *See Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2618.

II.

Section 136v(b) preempts those of the Papases' state law claims which constitute "requirements for labeling or packaging in addition to or different from" the labeling and packaging requirements imposed under FIFRA. *Cipollone* convinces us that the term "requirements" in section 136v(b) "sweeps broadly and suggests no distinction between positive enactments and the common law." *Cipollone, at* ___, 112 S.Ct. at 2620. Common law damages awards are one form of state regulation and, as such, are "requirements" within the meaning of section 136v. *See Id; Taylor v. General Motors Corp.,* 875 F.2d 816, 824 n. 16 (11th Cir. 1989), *citing San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1969). To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's "labeling or packaging" failed to meet a standard "in addition to or different

from" FIFRA requirements, section 136v preempts the claims.

The Papases' concede that each of their negligence, strict liability, and breach of implied warranty counts alleges in part that Zoecon failed to warn users that its product contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. Those allegations, like the failure to warn claims in *Cipollone,* require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone,* 505 U.S. at _____, 112 S.Ct at 2621-22. Thus the *Cipollone* opinion dictates, under an express preemption analysis, the same result we reached earlier under the implied pre-emption doctrine. *Cf. Papas I, supra,* 926 F.2d 1026.

III.

The Papases say that they seek to prove Zoecon *failed to disclose* to the Environmental Protection Agency ("EPA"), the agency which administers FIFRA, that Zoecon's product contained benzene. The Papases contend that this alleged omission subjects Zoecon to an agency enforcement

action for "misbranding,"[2] and they urge that common law damages awarded on this omission theory would not constitute a "requirement ... in addition to or different from" FIFRA requirements. We reject this argument. As we noted in *Papas I,* it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made. *See Papas I, supra,* 926 F.2d at 1026 n. 8. States may not interfere with the methods designed by Congress to achieve FIFRA's goals. *See Gade v. National Solid Wastes Management Association,* ___ U.S. ___, ___, 112 S.Ct. 2374, 2385, 120 L.Ed.2d 73 (1992). We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures.

IV.

Appellants urge us to hold that their warning claims "unrelated to labelling and packaging" are not pre-empted by section 136v. They contend that because the language of 136v refers only to "labelling or packaging," the section does not preempt failure to warn claims based on point-of-sale signs, consumer

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[2] Under FIFRA, a pesticide is misbranded if the label does not contain warnings and directions for use which, if complied with, are "adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(l)(F)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded. 7 U.S.C. § 136j(a)(1)(E). Because appellants "misbranding" theory is inseparable from FIFRA procedural requirements, we find no merit in appellants' contention that this theory of recovery is based on a generalized "duty not to deceive." *Cf. Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2624.

notices, or other informational materials that are "unrelated" to labelling and packaging. But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labelling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also preempted by FIFRA.

V.

The Supreme Court ruled that the *Cipollone* plaintiff's express warranty claims were not preempted by the 1969 Act. The Papases argue that this aspect of *Cipollone* mandates a finding of no preemption on their breach of *implied* warranty claim. We disagree.

In *Cipollone,* four Justices concluded that "the 'requirements' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed *by the warrantor.*" *Cipollone, supra,* 505 U.S. at ___, 112 S.Ct. at 2622. On the basis of that reasoning, the plurality concluded that Cipollone's breach of

express warranty claim was not pre-empted by the 1969 Act. *Id.* at ___, 112 S.Ct. at 2622-23. But an implied warranty is a requirement imposed under state law and is pre-empted by FIFRA.

Express warranties are promises that are made in some, but not all, sales contracts. Express warrantors seek competitive advantage by promising buyers that certain factual representations about their goods are true. Liability for breach of an express warranty has a voluntary quality, it "derives from, and is measured by, the terms of that warranty." *Cipollone,* at ____, 112, S.Ct. at 2622.

In contrast, implied warranties of merchantability arise by operation of law. *See Wagner v. Mars, Inc.*, 166 So.2d 673 (Fla.App.1964); *Atlantic Distributors, Inc. v. Alson Mfg. Co.*, 141 So.2d 305 (Fla.App.1962). Florida has codified the implied warranty of merchantability, which, unless waived or modified, is always implied in a sale of goods by a merchant and includes the statutory requirement that goods "are adequately contained, packaged, and labeled as the agreement may require." Fla.Stat.Ann § 672.314 (1992). Although liability for breach of an express warranty may be viewed as "imposed by the warrantor," *Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2622, liability for breach of an *implied* warranty is based on "the agreement, *imposed by law,* to be responsible in the event the thing sold is not in fact fit for the use and purposes intended." *Arcade Steam Laundry v. Bass,* 159 So.2d 915 (Fla.App.1964) (emphasis added). In essence, when plaintiffs argue that an implied warranty obligates the seller, plaintiffs

acknowledge that the seller did not volunteer for the liability.

FIFRA preempts claims based on requirements imposed *by states.* 7 U.S.C. § 136v(b). If Zoecon were to have liability for breach of an *implied* warranty of merchantability, that liability would not be self-inflicted. Instead, that liability would be based on a requirement imposed by state law. Therefore, to the extent the implied warranty claim depends upon inadequacies in labelling or packaging, FIFRA section 136v preempts the claim.

VI.

We conclude that FIFRA expressly preempts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging. To the extent that appellants' negligence, strict liability, and breach of implied warranty claims require a showing that Zoecon's labeling and packaging caused the alleged injury, those claims are preempted by FIFRA. Claims that do not challenge Zoecon's labeling and packaging practices are not pre-empted.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3752

District Court No. 88-00116-Civ.

MINAS H. PAPAS, OLLIE M. PAPAS,
his wife,

Plaintiffs-Appellants,

versus

THE UPJOHN COMPANY, a Delaware
corporation qualified to do
business in the State of Florida,
ZOECON CORPORATION, a Delaware
corporation currently doing
business in the State of Florida,

Defendants-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

Before ANDERSON and EDMONDSON, Circuit Judges,
and MORGAN, Senior Circuit Judge.

JUDGMENT ON REMAND
FROM
THE SUPREME COURT OF
THE UNITED STATES;

This cause came to be heard on remand from the Supreme Court of the United States;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in the light of Cipollone v. Liggett Group, Inc., 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

Entered: March 8, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Deputy Clerk

RE-ISSUED AS MANDATE: May 18, 1993.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MINAS H. PAPAS and OLLIE M. PAPAS, his wife,

Plaintiffs,

vs. Case No.88-116-Civ-J-14

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, and ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants.

ORDER AND PARTIAL SUMMARY JUDGMENT

I. Defendant's Motion For Partial Summary Judgment

This case came on to be heard on Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989; Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989; and plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989. The Court heard oral argument on May 26, 1989.

Defendant Zoecon argues that plaintiffs' claims for negligence, strict liability, and implied warranty are preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, [hereinafter "FIFRA"], to the extent that the claims are based on defendant's failure to warn about the dangers of Paramite. The Court shall review the legislative history of FIFRA and determine whether or not FIFRA preempts plaintiff's claims based on defendant's failure to warn.

A. Standard To Be Applied On Summary Judgment

A district court's review of a case on a motion for summary judgment is governed by Fed.R.Civ.P. 56. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the district court that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Fed.R.Civ.P. 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. 477 U.S. at 325. When a moving party has so discharged its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

The district court must enter summary judgment "after adequate time for discovery and upon motion,

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322; Fed.R. Civ.P. 56(c). *See also Reflectone, Inc. v. Farrand Optical Co., Inc.* 862 F.2d 841, 843-4 (11th Cir. 1989). Whether or not the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, requires the court to draw inferences from the evidence as viewed in the light most favorable to the nonmoving party, and to resolve all reasonable doubts in that party's favor.

The Eleventh Circuit Court of Appeals explained the reasonableness standard in *WSB-TV v. Lee,* 842 F.2d 1266, 1270 (11th Cir. 1988):

> In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." ... The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts.... When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

842 F.2d at 1270 (citations omitted).

Fed.R.Civ.P. 56(c) requires the district court to deny a motion for summary judgment if the court finds that there exists a genuine issue for trial. What constitutes a "genuine issue for trial" was addressed by the Supreme Court in *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court stated that "summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court further stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52.

The Court finds that the parties have had adequate time to conduct discovery in this case. The Court will, therefore, address the motion for partial summary judgment.

B. Preemption Of State Tort Law By FIFRA

1. The Concept of Federal Preemption

The doctrine of preemption is based on Article VI, Clause 2 of the United States Constitution which provides:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Preemption is deemed mandatory when Congress expresses a clear intent to preempt state law, where there is a conflict between state and federal law, where compliance with both state and federal law is impossible, where federal law implicitly bars state regulation, where Congress has legislated comprehensively, or where state law serves as an obstacle to federal objectives. *Public Service Commission v. Federal Communications Commission,* 476 U.S. 355, 368-69 (1986) *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984). This Court has recognized that, in deciding whether a federal statute preempts state law, "the Court must ascertain Congressional intent in enacting the federal statute at issue." *Blue Cross and Blue Shield of Florida. Inc. v. Department of Banking and Finance,* 613 F. Supp. 188, 191 (M.D.Fla. 1985), *aff'd* 791 F.2d 1501 (11th Cir. 1986). An analysis of the legislative history and the specific provisions of FIFRA reveals that in enacting FIFRA Congress expressly intended to preempt state labeling requirements.

2. Legislative History of FIFRA

FIFRA represents the federal government's detailed comprehensive system for the strict regulation of pesticides. FIFRA was enacted in June, 1947, to replace and expand the protection afforded by the Insecticide Act of 1910, the first federal act regulating the pesticide industry. H.R. Rep. No. 313, 80th

Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1200, 1201. The 1947 Act gave the United States Department of Agriculture authority over the regulation, registration and labeling of "economic poisons and devices."

In 1972, FIFRA was completely revised. Responsibility for enforcement of FIFRA was transferred from the Department of Agriculture to the newly created Environmental Protection Agency [hereinafter "EPA"]. The two major goals of the 1972 revisions were to "regulate the use of pesticides to protect man and his environment" and to "extend Federal pesticide regulations to actions *entirely within a single State*." S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993 (emphasis added). The intent to create a comprehensive regulatory statute is demonstrated by the President's environmental message included in the Senate report on the proposed 1972 Act. It noted, in pertinent part, that:

> Currently, Federal controls over pesticides consist of the regulation of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of pesticides. The labels approved under the Act specify uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed.

> The comprehensive strengthening of our pesticide control laws is needed.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4093-94.

Both the House and Senate bills explicitly detail the desire for federal preemption concerning labeling. The House bill provides:

> Section 23. AUTHORITY OF STATES
>
> Subsection (b) *preempts any State labeling or packaging requirements* differing from such requirements under the Act.

H.R. 10729, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4010, 4021 (emphasis added). Similarly, the Senate bill provides:

> Section 24. AUTHORITY OF STATES
>
> Subsection (b) *preempts any State or local government labeling or packaging requirements* differing from such requirements under the Act.

S. Rep. No. 92-970, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4128 (emphasis added). Therefore, it is clear that the express intent of Congress in enacting the 1972 revisions to FIFRA was to preempt state regulation of labeling requirements. The authority to promulgate such regulations was reserved exclusively for the EPA.

3. Preemption Of State law By FIFRA

FIFRA is explicit as to the preemption of state authority to regulate pesticide labeling. It specifically provides that:

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). The statutory language of FIFRA creates a prohibition of "any requirements for labeling" by states. Similarly FIFRA'S legislative history demonstrate a definitive congressional mandate that the regulation of pesticide labeling be controlled solely by the EPA.[1] It is clear that Congress has legislated comprehensively, barring the states from interfering with the regulation of pesticide labels.

4. Judicial Precedent in Support of FIFRA Preemption

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[1] Pursuant to FIFRA, the EPA has enacted a series of regulations. Pursuant to 7 U.S.C. § 136a(c)(5)(C), the administrator of the EPA shall register a pesticide if he determines, *inter alia,* that it will perform its intended function without "unreasonably adverse effects" on man or the environment. A pesticide that is duly registered with the EPA must bear a label which contains EPA-approved warnings that the product is adequate to protect health and the environment. 7 U.S.C § 136(q)(1)(G). Moreover, a label cannot contain language that is not approved by the EPA. 40 C.F.R. 162.10(a) Pursuant to the regulations promulgated under FIFRA, the EPA not only specifies the particular warning language required, *see* 40 C.F.R. § 162.10(a)(1), but also the type size, *see* 40 C.F.R. 162.10(a)(2)(ii)(A), color, *see* 40 C.F.R. 162.10 (a)(2)(ii)(B), and placement, *see* 40 C.F.R. 162.10(a)(4), of the warning and all other specifications concerning labeling.

FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald v. Mallinckrodt,* 681 F.Supp. 404 (E.D.Mich. 1987). In *Fitzgerald* plaintiff alleged personal injuries resulting from his exposure to defendant's chemical product, Calo-Clor, during the course of his employment. Calo-Clor is an inorganic mercury-based fungicide which was registered with the EPA pursuant to FIFRA.

In granting summary judgment to the defendant on the basis of preemption, the Court recognized that in enacting FIFRA "Congress had *enacted a comprehensive system* for the registration and labeling of pesticides." 681 F.Supp. at 406 (emphasis added). The Court determined that "any state law tort recovery based on failure to warn theory, would abrogate the Congress' intent to provide uniform regulations governing the labeling of pesticides." *Id.* at 407.

In reaching its conclusion that state tort claims were preempted by FIFRA, the Court in *Fitzgerald* considered and rejected an earlier contrary holding in *Ferebee v. Chevron Chemical Company,* 736 F.2d 1529 (D.C. Cir.), *cert. denied,* 469 U.S. 1062 (1984). Instead, the court relied on the recent holding in *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987), *cert. denied,* 1989 U.S. LEXIS 338, where the First Circuit reasoned that a finding that a label is inadequate under a state tort theory,

> effectively compels the manufacturer to alter its warning to conform to different state law

> requirements as "promulgated" by a jury's findings.... This challenge to the federal warning label's sufficiency--surely contravenes the Act's policy of uniform labeling.... Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

Fitzgerald, 681 F.Supp. at 407, (*quoting Palmer v. Liggett Group. Inc.,* 825 F.2d at 627-28). *See also Cipollone v. Liggett Group. Inc.,* 789 F.2d 181 (3rd Cir. 1986)(finding the Federal Cigarette Labeling and Advertising Act preempts state tort claims based on alleged inadequacy of warnings).

The reasoning of *Fitzgerald* applies in this action. To permit additional labeling requirements to be imposed under state common law "would effectively authorize the state to do through the back door" that which was expressly preempted through the front. *Fitzgerald,* 681 F. Supp. at 407.

Plaintiffs' argument against preemption is primarily based upon *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA does not preempt state tort actions based on the inadequacy of an EPA-approved label. Central to the decision in *Ferebee* was the determination that a state court jury verdict does not automatically "require" a manufacturer to change its labels, but rather leaves to the manufacturer the "choice of how to react" to such jury verdict. *Id.* at 1542. ("Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort

plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.")

This Court must reject any argument holding that a state court jury verdict would merely leave to the manufacturer the "choice of how to react" to such jury verdict and would not automatically "require" a manufacturer to change its labels. As the First Circuit noted in *Palmer:*

> *This "choice of reaction" seems akin to the free choice of coming up for air after being underwater.* Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. *The most obvious change it can take, of course, is to change its label.*

Palmer v. Liggett Group, 825 F.2d at 627-28 (emphasis added).

This "choice of reaction" analysis was expressly considered and rejected in *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987), in which it was held that FIFRA preempts state tort actions based on the inadequacy of an EPA-approved label. Most recently, the "choice of reaction" analysis has been rejected by the United States Supreme Court in *International Paper Company v. Ouellette,* 479 U.S. 481 (1987).

Ouellette involved an action against a paper mill located in New York State that discharged effluent into Lake Champlain pursuant to a discharge permit issued under the Clean Water Act, 33 U.S.C. § 1251, *et seq*. Plaintiffs, residents of Vermont, filed suit against the paper mill alleging that the discharge constituted a common-law nuisance under Vermont law. A preemption argument was raised based upon the Clean Water Act's prohibition of state regulation of an out-of-state "source" of discharged effluent. The Supreme Court held that the Clean Water Act preempted the common-law nuisance action. In doing so, the Court noted:

> The affected state's nuisance laws would subject [International Paper] to the threat of legal and equitable penalties.... Such *penalties would compel the source* to adopt different control standards and a different compliance schedule from those approved by the EPA....

Ouellette, 479 U.S. at 495 (emphasis added). Additionally, the Court held that:

> If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, *at a minimum* [International Paper] *would have to change* its methods of doing business and controlling pollution to avoid the threat of ongoing liability .... The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not

> do directly -- regulate the conduct of out-of-state sources.

Id. (emphasis added).

Although the Eleventh Circuit Court of Appeals has not specifically considered whether or not FIFRA preempts state common law torts that impose requirements for insecticide labels, the court has in a recent case affirmed the principle that a State regulates by creating common law tort claims just as it does by creating other forms of preventive relief. *See Taylor v. General Motors Corp.*, No. 87-5879 (11th Cir. June 14, 1989). The court held that the National Traffic and Motor Vehicle Safety Act impliedly preempted state tort law. The court came to this conclusion even in the face of a "savings clause" which stated that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* at 2978 (quoting 15 U.S.C. § 1397(c).

The preemption of state tort law by FIFRA is even stronger than the preemption found in *Taylor*. In this case, Congress has expressly preempted state law. Furthermore, Congress has not provided a savings clause that would revive any common law remedies that regulate insecticide labels.

The Court finds, therefore, that a state court jury verdict would have the effect of "regulating" the content of a warning label. Since FIFRA expressly preempts state law regulation of pesticide labeling,

plaintiffs' state law claims fail to the extent that they are based on defendant's failure to warn.

5. Approval Of Defendant's Labels By The EPA

Plaintiffs argue that the defendant has not established that the EPA approved its labels and that absent such approval, the preemption defense is not established. Plaintiffs specifically object to the defendant's introduction of the affidavits of individuals who do not have personal knowledge of whether or not the EPA approved defendant's labels.

The Court disagrees with plaintiffs' implicit assumption that the preemption defense requires a showing that the EPA actually approved defendant's labels. At most, such a showing would establish that the defendant violated federal regulations concerning labeling. Such a showing would not negate the fact that Congress has expressly preempted state regulation of labeling through a specific expression to that effect by statute. The Court finds that various affidavits submitted by the defendant to show that the EPA approved its labels are irrelevant to this proceeding and have no bearing on this Court's finding of preemption.

6. Necessary And Available Information

The Court disagrees with plaintiffs' argument that preemption requires defendant to show that they have provided to the regulatory agency all the necessary and available information on which to base

a warning. A showing that the EPA approved defendant's labels based on inadequate information would not negate a finding that under the law of preemption, the EPA has the exclusive right to regulate those labels. A showing that the EPA based its decision on inadequate information would be appropriate if, for example, the agency approval of defendant's labels were offered for its collateral estoppel effect. This court's finding of preemption is not based on collateral estoppel or on the agency's approval of the defendant's labels.

The Court's finding of preemption in this case is based on the fact that Congress expressly preempted state law. If Congress has taken away the ability of the states to regulate labels and assigned the regulation of labels to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry. This court cannot second guess the wisdom of that decision. A cause of action based on insufficient labeling would subvert the regulatory scheme for pesticide labeling. Such a cause of action would permit states to regulate labels in the guise of an action for damages and violate Congress's expressed mandate that state's should not regulate labels.

C. Plaintiffs' Remaining Claims: Defectiveness And Unreasonable Dangerousness Under Non-Warning Theories

In Florida the elements of a cause of action for strict liability in tort are 1) the manufacturer's relationship to the product in question, 2) the defective and unreasonably dangerous condition of the product, and 3) the existence of the proximate causal connection between such condition and the user's injuries or damages. *West v. Caterpillar Tractor Company. Inc.,* 336 So.2d 80, 87 (Fla. 1976). The elements of a cause of action in a negligence products liability case are 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury or damage of which plaintiff complains, 2) the failure of the defendant to perform that duty, and 3) injury or damage to plaintiff proximately caused by such failure. *Blackton Building Supply Co. v. Garesche,* 383 So.2d 250, 251 (Fla. 5th DCA 1980). In practice, the causes of action for strict liability in tort and negligence are similar, and both require proof that the defendant's product was defective and unreasonably dangerous. *See Witt v. Norfe. Inc.,* 725 F.2d 1277-79 (11th Cir. 1984).

Florida law recognizes that the defective and unreasonably dangerous condition of a product can be established by showing that a product contained a manufacturing flaw, *see Matter of Standard Jury Instr. (Civil Cases),* 435 So.2d 782, 782-83n.* *(citing* Restatement (Second) of Torts, § 402A, comment k,

(1965)), or by showing that a product contained a design defect. Id. It appears that Florida courts have not spoken definitively as to whether or not a manufacturer's failure to warn can constitute a ground for finding a product defective and unreasonably dangerous. *See id.,* 435 So.2d at 783 n.*.

This Court assumes without deciding that Florida law would recognize that a manufacturer's failure to warn could at least under certain conditions render a product defective and unreasonably dangerous. Although this Court is aware that other jurisdictions have found that a manufacturer's failure to warn can constitute an independent ground for finding a product to be defective and unreasonably dangerous, *see 2 American Law of Products Liability 3d,* Part 5, Chapter 17, § 17:3, n.9 (T.E. Travers ed. 1987), this Court's ruling should not be interpreted as any extension of Florida law on this issue. In light of the Court's conclusion that any cause of action based on the defendant's failure to warn is preempted, the existence of the cause of action in the first instance is immaterial to the Court's decision.

The Court finds that plaintiffs' theory for finding the products defective and unreasonably dangerous is not based exclusively on defendant's failure to warn, but on a theory that products containing Paramite have design defects and/or manufacturing flaws. To the extent that plaintiffs' claims are based on the defective and unreasonably dangerous condition of defendant's products due to defendant's failure to warn, plaintiffs' claims are preempted as a matter of law. To the extent that plaintiffs' claims are

otherwise based on the defectiveness or unreasonable dangerousness of defendant's product on theories of defective design or manufacturing flaw, the plaintiffs' claims remain viable.

This Court stresses that this opinion does not address any issue not raised and briefed by the parties. In particular, the parties have not addressed the question whether or not the defendant can assert its warnings as a defense to plaintiffs' remaining claims, or whether or not the assertion of a defense of warning is preempted by FIFRA.

II. Interlocutory Appeal

The Court finds that this order and partial judgment, although interlocutory in character, involves a controlling question of law as to which there is substantial ground for difference of opinion and upon which an immediate appeal from the order may materially advance the ultimate termination of the litigation. In particular, the Court finds that whether or not FIFRA expressly preempts state products liability law is such a question. The Court so certifies pursuant to 28 U.S.C. § 1292(b).

The Court reminds the parties that either or both of them have ten (10) days from the date of this order in which to file an application under 28 U.S.C. § 1292(b) for the Court of Appeals to review this order and partial judgment. If either of the parties file such an application with the court of appeals, this Court shall stay all proceedings in this case pending the disposition of the § 1292 application by court of

appeals and any interlocutory appeal which that court may entertain.

III. Plaintiffs' Remaining Motions

As to Plaintiffs' Motion For Leave To File Amended Complaint And For leave To Join Koch Refining Company As Defendant, filed May 24, 1989, the Court finds that the Amended Complaint attached to the motion contains claims based on defendant's failure to warn. The Court also notes that the ultimate contents of the complaint may be affected by a possible interlocutory appeal.

The Court will, therefore, deny the motion to file the amended complaint attached to the motion. The Court will, however, give plaintiffs leave to file an amended complaint subsequent to the court of appeals' decision on any application for interlocutory appeal and subsequent to any interlocutory appeal that the court of appeals may thereupon entertain.

Accordingly, it is

ORDERED and ADJUDGED:

1. That Defendant Zoecon Corporation's Motion for Partial Summary Final Judgment, filed April 10, 1989, is granted.

2. That judgment is hereby entered for defendant Zoecon and against the plaintiffs to the extent plaintiffs' claims are based on the defendant Zoecon's failure to warn.

3. That Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, is denied.

4. That plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989, is denied.

5. That this Court hereby certifies that this order and partial judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal under 28 U.S.C. § 1292(b) would materially advance the ultimate termination of the litigation.

6. That either or both parties may within ten (10) days from the date of this order file an application under 28 U.S.C. § 1292(b) with the court of appeals to review this order and partial judgment.

7. That if either plaintiff or defendant Zoecon should file a §1292(b) application with the court of appeals, all proceedings in this case shall thereupon be stayed pending the disposition of the § 1292 application and any interlocutory appeal which the court of appeals may thereupon entertain.

8. That if the court of appeals accepts jurisdiction over the interlocutory appeal, the pretrial conference set for December 19, 1989, shall automatically be cancelled until further order of the Court, and the parties shall automatically be relieved

from being required to file a pretrial stipulation until further order of the Court.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of Aug., 1989.

/s/ SUSAN H. BLACK
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Garry Randolph, Courtroom Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-2167

MINAS H. PAPAS and
OLLIE M. PAPAS, his wife,

Petitioners,

versus

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida,
ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Respondents.

Application for Permission to Appeal
from the United States District Court
for the Middle District of Florida

Before RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. Section 1292(b) is GRANTED.

Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs-Appellants

v.

The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.

No. 89-3752.

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1991.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Minas and Ollie Papas ("Papas") filed a diversity action in federal district court against the Upjohn Company and Zoecon Corporation. The complaint alleged that Minas, while working for a humane society, had applied certain pesticides manufactured by Upjohn and Zoecon to dogs to rid the dogs of fleas, ticks, and other pests. The complaint also alleged that these chemical products caused him to suffer health problems. The complaint sounded in negligence, strict liability, and breach of implied warranty of merchantability, and included a derivative claim for loss of consortium. The three main counts were, in whole or in part, claims of inadequate labeling in the light of alleged dangers arising from exposure to the pesticides.

Zoecon moved for partial summary judgment on the labeling claims. It argued that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA"), under which its product is registered, preempted such claims. The district court agreed and granted Zoecon's motion. Having determined that this issue involves a controlling question of law on which there are substantial grounds for difference of opinion[1] and that

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[1] Only one federal appellate court has considered the issue in *Ferebee v. Chevron Chemical Company,* 736 F.2d 1529 (D.C.Cir.1984), the court concluded that FIFRA did not preempt state common law tort suits based on inadequate labeling. District courts are split on the issue. Cases finding preemption include *Hurt v. Dow Chem. Co.,* No. 90-0783-C(3)(E.D.Mo. Sept. 28, 1990); *Kennan v. Dow Chem. Co.,*717 F.Supp. 799 (M.D.Fla. 1989); *Fisher*

an immediate appeal would materially advance the ultimate determination of the litigation, the district court certified the matter for interlocutory appeal, pursuant to 28 U.S.C.A. § 1292(b). We granted the petition to appeal, and the appeal followed. We conclude that state common law tort claims for inadequate labeling are impliedly preempted by FIFRA and, accordingly, affirm the district court's grant of partial summary judgment.

I. THE DOCTRINE OF FEDERAL PREEMPTION

Federal preemption of state law is based on the supremacy clause of the Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

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v. Chevron Chem. Co., 716 F.Supp. 1283 (W.D.Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-C (S.D.Ind. Dept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D.Md.Nov. 8, 1988); and *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D.Mich. 1987). Cases in which district courts found no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F.Supp. 1474 (D.Colo. 1990); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preservers Inst.*, No. IP 87-383-C (S.D.Ind. Sept. 18, 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D.La. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F.Supp. 85 (E.D.Pa. 1989); *Whitner v. Reilly Indus., Inc.*, No. 87-5224 (S.D.Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D.Ill. 1988); and *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D.N.Y. 1986).

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl.2. Preemption can be either express or implied; it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)(quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

Preemption can be inferred

(1) "when there is outright or actual conflict between federal and state law;"

(2) "where compliance with both federal and state law is in effect physically impossible;"

(3) "where there is implicit in federal law a barrier to state regulation;"

(4) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or

(5) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986)(citations omitted); *see also International Paper Co. v. Ouellette,* 479 U.S. 481, 491-92, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987); *Hillsborough County, Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *De La Cuesta,* 458 U.S. at 153, 102 S.Ct. at 3022; *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-26 (11th Cir. 1989); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987). A state law -- even if it has the same ultimate goal as a federal law -- may stand as an obstacle to the full implementation of a federal law and therefore be preempted "if it interferes with the methods by which the federal statute was designed to reach this goal." *Ouellette,* 479 U.S. at 494, 107 S.Ct. at 813.

The principle of implied preemption "applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule." *Taylor,* 875 F.2d at 826 (citations omitted). *Accord Ouellette,* 479 U.S. at 494-95, 499 n. 20, 107 S.Ct. at 813, 815 n. 20 (state nuisance suits preempted by Clean Water Act); *Louisiana Public Service Comm'n,* 476 U.S. at 369, 106 S.Ct. at 1898-99 (federal agency action may preempt state regulation); *Automated Med. Labs.*, 471 U.S. at 713, 105 S.Ct. at 2375 (federal regulations can preempt state law); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986)(state common law damage actions can have effect of imposing requirements which create obstacle to accomplishment of "full purposes and objectives of

Congress")(decision and reasoning adopted by Eleventh Circuit in *Stephen v. American Brands, Inc.*, 825 F.2d at 313). Thus, we have recognized that the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor,* 875 F.2d at 824 n. 16 (citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)).

The critical question in considering whether state law is preempted by federal law is Congressional intent -- that is, "whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n,* 476 U.S. at 369, 106 S.Ct. at 1899. "[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects": even if statutory language or legislative history is unclear, federal law preempts state law if "the ordinary application of the two laws creates a conflict." *Taylor,* 875 F.2d at 826.

II. THE FIFRA SCHEME OF PESTICIDE REGULATION AND LABELING

FIFRA, initially enacted in 1917, was completely revised in 1972, when the responsibility for its enforcement was transferred to the Environmental Protection Agency ("EPA") from the Department of Agriculture. The Senate Committee on Agriculture and Forestry, to which the bill was referred, identified two purposes of the 1972 revisions to FIFRA: to "(A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide

regulation to actions entirely within a single State." S.Rep. No.92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. At that time, FIFRA was amended to define "protect health and the environment" and "protection of health and the environment" as "protection against any unreasonable adverse effects on the environment." 7 U.S.C.A. § 136(x). "Unreasonable adverse effects on the environment" was, in turn, defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C.A. § 136(bb).

FIFRA's legislative history indicates that Congress intended to establish a comprehensive regulatory scheme in which the EPA Administrator would be responsible for determining whether to register a pesticide and, if so, under what circumstances. Congress recognized that the control of pesticides required a careful balancing of benefit against risk:

> While appropriate pesticides properly used are essential to man and his environment, many constitute poisons that are too dangerous to be used for any purpose. Others are dangerous unless used extremely carefully ... Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.

S.Rep. No. 92-838, 92d Cong. 2d *Sess., reprinted* in 1972 U.S. Code Cong. & Admin. News at 3996. The EPA administrator was designated as the entity to conduct the balancing analysis:

> The question [the Administrator] must decide is "Is it better for man and the environment to register this pesticide, or is it better that this pesticide be banned?" He must consider hazards to farmworkers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain when it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due. No one should be given undue consideration, no one should be singled out for special mention, no one should be considered a "vital" criterion.
>
> For each pesticide the Administrator must ask the same question .... In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.

Id. at 4032-33. Under FIFRA, the Administrator is required to register a pesticide if he determines that, when considered with any restrictions imposed on it, the pesticide warrants the proposed claims made for

it; its labeling and other materials comply with FIFRA requirements; it will perform its intended purpose without unreasonable adverse effects on the environment; and when used in accordance with common practice, it will not generally cause unreasonable adverse effects on the environment. *See* 7 U.S.C.A. § 136a(c)(5).

In this comprehensive regulatory scheme for pesticides, Congress delineated the extent to which the states could regulate pesticides in section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and

> use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator ....

7 U.S.C.A. § 136v (West 1980 & Supp. 1990) (subsection headings added by 1988 amendment).

The statute's language, by itself, is a powerful limit on state power over labeling. A report accompanying the bill, as originally reported out of the House Committee, also indicated the limits on state power due to the division of authority between the federal and state governments: "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard to labeling and packaging." H.R.Rep. 92-511, 92d Cong. 1st Sess. 16 (1971). Congress recognized that, while the intent of this provision was "to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act," subsection (b) preempted "any State labeling or packaging requirements differing from such requirements under the Act." S.Rep. 92-838, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News at 4021 (emphasis supplied); *see also* S.Rep. 92-970, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 4092, 4128.

FIFRA directs that States "shall not impose or continue in effect any requirements for labeling or packaging" beyond the requirements imposed by FIFRA. Given FIFRA's words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before us, just as FIFRA preempts other legal requirements in the form of state statutes and regulations. But, mindful that "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," *Taylor,* 875 F.2d at 824, we admit to a little uncertainty and pass over the question of express preemption. Instead, we will decide whether federal preemption of state common law tort claims based on labeling deficiencies can be inferred from FIFRA and the labeling regulations promulgated under it.

III. STATE COMMON LAW TORT LABELING CLAIMS IMPLIEDLY PREEMPTED BY FIFRA

Under FIFRA, the federal government -- through the EPA -- has the sole and exclusive right to regulate pesticide labels. While states can regulate the sale or use of federally registered pesticides, no state can "impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from" those required by FIFRA. 7 U.S.C.A. § 136v(b).

In 40 C.F.R. Part 156, the EPA has regulated almost every aspect of pesticide labeling. The EPA specifically regulates the manner in which warnings and precautionary statements for the pesticides are to

be presented and provides specific requirements about the content, placement, type size, and prominence of the warnings and precautionary statements. *See* 40 C.F.R. § 156.10(h) (1990). These warnings and precautionary statements concern the toxicological hazards of the pesticide, including "hazard to children, environmental hazard and physical and chemical hazard." *Id.* The EPA also requires that a statement of practical treatment (that is, first aid or other treatment) for each pesticide appear on the label. 40 C.F.R. § 156.10(h)(1)(iii). Additional warnings and precautionary statements about risks to humans are required under the heading "Precautionary Statements" and the subheading "Hazard to Humans and Domestic Animals."[2] Typical precautionary statements are prescribed which "must be modified or expanded to reflect specific hazards." *See* 40 C.F.R. § 150.10(h)(2)(i)(B) and table.[3] In addition, the EPA requires that pesticide labels must contain directions for use stated in terms "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. §

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[2] The EPA requires that if a hazard exists to humans or domestic animals, these precautionary statements must indicate (1) "the particular hazard," (2) "the route(s) of exposure," and (3) "the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). The precautionary statements indicate whether protective equipment or garments are necessary when applying the pesticide.

[3] A pesticide is considered misbranded if "the label does not contain a warning or caution statement which may be necessary" and which if complied with, "is adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded.

156.10(i)(1)(i). These directions, when followed, "must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.*[4] It is in the light of these comprehensive regulations that the EPA approves a specific label for each pesticide.

We conclude that FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways. First, having considered FIFRA's express prohibition of state labeling requirements in addition to those required under FIFRA, 7 U.S.C.A. § 136v(b), and having examined the labeling regulations adopted pursuant to FIFRA, see *supra*, we hold that the federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

We also hold that jury awards of damages in such tort actions would result in direct conflict with federal law. For EPA registered pesticides, the warning and use statements present on the labels

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[4] In addition, a pesticide is considered misbranded -- and a manufacturer subject to various penalties, including registration revocation -- if the labeling "does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with ... are adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(F). "The basic purpose of the statute [is] to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions." *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D.Ill. 1988)(quoting *Continental Chemiste Corp. v. Ruckelshaus*, 461 F.2d 331, 335 (7th Cir. 1972)).

indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See* 7 U.S.C.A. §§ 136(q)(1)(F), 136(q)(1)(G), 136 (bb); 40 C.F.R. §§ 156.10(h), 156.10(i). Thus, a jury determination, via a state common tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks. Such a jury determination is also in direct conflict with the Congressional intent that *the EPA Administrator* determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides[5]

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[5] The states are specifically permitted to make such determinations with respect to the "sale or use" of pesticides, as long as they do not permit any sale or use prohibited by the federal government under FIFRA. *See* 7 U.S.C.A. § 136v(a). *New York State Pesticide Coalition Inc. v. Jorling,* 874 F.2d 115 (2d Cir. 1989), is instructive about the respective authority of the state and federal governments to regulate pesticides under FIFRA. In *Jorling* the Second Circuit upheld certain state notification requirements placed on commercial pesticide applicators. It noted that "[t]he states have joint control with the federal government in regulating the use of pesticides, for the safety of its citizens and the environment ... with the exception of the EPA's exclusive supervision of labeling." 874 F.2d at 118 (citation omitted). It drew a distinction between FIFRA labeling which "is designed to be read and followed by the end user," and notification requirements -- regulation on pesticide use -- placed on particular end users (professional pesticide applicators) which require them to provide certain information to those who contract to have pesticide applied, and to members of the public who may be exposed to the chemicals as a result of their application to public areas. *Id.* at 119.

In addition, allowing state common law tort suits for inadequate labeling would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." One of the EPA's objectives in its labeling regulations is the uniformity of labeling across the nation and among (1) different brands of the same pesticide, (2) different pesticides performing the same function, and (3) different pesticides posing the same or similar risks to health and the environment. *See* 40 C.F.R. Part 156.[6] This objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136v(b) which prohibits state regulation of pesticide labeling and packaging, Congress added the heading "Uniformity" to this section. A jury determination that a label was inadequate would require that the manufacturer change the label or risk

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[6] This desire for uniformity is particularly evident in the regulation of pesticide warnings. Pesticides are grouped into four human toxicity categories based on selected hazard indicators, which include oral, inhalation, and dermal toxicity indicators and the effects of pesticide contact with eyes or skin. *See* table at 40 C.F.R. § 156.10(h)(1). The text of the warning on the front panel of the label is based on the pesticide's toxicity category. 40 C.F.R. § 156.10 (h)(1). EPA regulations dictate which of four signal words can be used on the front panel of the label, depending on the toxicity category into which the pesticide falls--"Danger" and/or "Poison" for category I: "Warning" for category II; and "Caution" for categories III and IV. 40 C.F.R. §§ 156.10(h)(1)(i)(A)--156.10(h)(1)(i)(D). A pesticide manufacturer is *not* allowed to use "signal word(s) associated with a higher Toxicity Category" on its label, unless the EPA determines that "such labeling is necessary to prevent unreasonable adverse effects on man or the environment." 40 C.F.R. § 156.10(h)(1)(i)(E). In addition, a manufacturer cannot put more than one human hazard signal word on the front panel of the label. *Id.*

additional suits for damages. Such a change, if permitted by the EPA, would destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling because the warning label for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee,* 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling. *See Kennan v. Dow Chem. Co.,* 717 F.Supp. 799, 806-07 (M.D.Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.,* 681 F.Supp. 404, 107 (E.D.Mich. 1987); *see also Palmer v. Liggett Group, Inc.,* 825 F.2d 620, 627-28 (1st Cir. 1987)(damages awards for inadequate labeling preempted by Federal Cigarette Labeling and Advertising Act). This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.

In this way, state common law tort suits based on labeling claims would also "stand as an obstacle to the accomplishment and execution of the full objectives of Congress" even if such suits led to "better" or "more adequate" labels, there by serving

FIFRA's goal of regulating pesticides "to protect man and his environment." A state law action which shares the same purpose as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods; as the Supreme Court said in *Ouellette,*

> it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designated to reach this goal.

479 U.S. at 494, 107 S.Ct. at 813. For the labeling of pesticides, the EPA evaluates the toxicological data of any individual pesticide in comparison with the toxicological data for other pesticides, to achieve the protection of "man and his environment" through a labeling system that is uniform and consistent across the broad spectrum of pesticides. A jury's imposition of damages in a state tort suit premised on labeling claims would disrupt the methods by which FIFRA protects man and the environment because it would inject irrelevant considerations into the EPA's

evaluation of a pesticide and its labeling and would second guess the EPA's conclusions.[7]

Allowing state common law tort actions based on labeling claims would permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides. As we have stated before, the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor,* 875 F.2d at 824 n. 16. Considering our understanding of Congress's intent, we decline to permit such state regulation.

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[7] As the Supreme Court noted in the context of the Clean Air Act, [s]uch penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits .... If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability .... The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly -- regulate the conduct of out-of-state concerns. *Ouellette* 479 U.S. at 495, 107 S.Ct. at 813.

IV. CONCLUSION

We hold that FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the extent that such actions are based on claims of inadequate labeling.[8]

The judgment of the district court is AFFIRMED.

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[8] Papas contends that even if we hold that FIFRA preempts state common law tort suits based on labeling claims, we should recognize an exception for instances in which, as Papas says exists here, a manufacturer has failed to provide the EPA with complete information on the pesticide. *See Hurley v. Lederle Labs. Div. of American Cyanamid Co.*, 863 F.2d 1173, 1179-80 (5th Cir. 1988). To the extent that *Hurley* purports to recognize an exception to federal preemption of common law tort labeling claims when the federal statute involved explicitly prohibits state regulation of labeling and the federal agency has received incomplete information from the manufacturer, we reject its holding at least as applied to FIFRA-regulated pesticides. Given the FIFRA regulatory scheme, it would be up to the EPA--and not a jury--to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected.

SUPREME COURT OF THE UNITED STATES

No. 90-1837

Minas H. Papas, et ux.,

Petitioners,

v.

Zoecon Corporation

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___ (1992).

IT IS FURTHER ORDERED that the petitioners, Minas H. Papas, et ux., recover from Zoecon Corporation Three Hundred Dollars ($300.00) for their costs herein expended.

June 29, 1992

Clerk's costs: $300.00

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3752

D. C. Docket No. 88-00116-Civ-J-14

MINAS H. PAPAS, OLLIE M. PAPAS, his wife,

Plaintiffs-Appellants,

versus

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

U.S. Court of Appeals
Eleventh Circuit
FILED
Aug 4 1992
MIGUEL J. CORTEZ, CLERK

O R D E R:

Appellant is directed to file a supplemental brief within 20 days of this order and to comment on the significance of Cipollone v. Liggett Group, Inc., No. 90-1038 (U.S. 24 June 1992) for this case. Appellee shall reply within 14 days after service of appellant's brief. The briefs shall not exceed 20 pages.

/s/ J. L. EDMONDSON
United State Circuit Judge

Supreme Court, U.S.
JUL 29 1993

No. 92-1938

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992), which expressly prohibits the states from imposing "any requirements" for pesticide labeling or packaging "in addition to or different from those required" under FIFRA, preempts state common law failure to warn claims against pesticide manufacturers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1938

MINAS H. PAPAS, *et al.*,

Petitioners,

v.

ZOECON CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition seeks review of the Eleventh Circuit's opinion on remand, which reaffirms in light of *Cipollone v. Liggett Group* the district court's interlocutory ruling that FIFRA preempts Petitioners' state common law failure to warn claims against Respondent Zoecon Corp.,[1] manufacturer and distributor of the FIFRA-labeled pesticide product involved in this case. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) ("*Papas II*"). The court of appeals concluded in its remand decision that "the *Cipollone* opinion dictates, under an express pre-emption analysis, the same result . . . reached earlier under the implied pre-emption doctrine." *Id.* at 518 (citing *Papas*

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[1] Zoecon has no subsidiaries which are not wholly owned. Its parent is Sandoz Agro, Inc., a subsidiary of Sandoz Ltd.

v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991) ("*Papas I*")).[2]

Contrary to Petitioners' assertions, this case does not involve the question of whether pesticide manufacturers should have "immunity" from product liability suits. The court's opinion in *Papas II* makes it clear that FIFRA preempts any state law claim which challenges, either directly *or* indirectly, the adequacy of the warnings on a pesticide manufacturer's federally regulated labeling, but does not preempt product liability claims that are unrelated to labeling or warnings. *Id.* at 519-20. Only Petitioners' failure to warn theories are at issue in this appeal; Petitioners remain free to pursue their non-warning related claims (i.e., design defect, manufacturing flaw) in the district court.[3]

No trial has been held in this case. There has been no finding that Petitioner Minas Papas's blood disorder was caused by his occupational use of Zoecon's federally registered veterinary pesticide product, Paramite, or that the minuscule amount of benzene impurity in one of that

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[2] In *Cipollone*, which was decided in June 1992, the Supreme Court held in pertinent part that the Public Health Cigarette Smoking Act of 1969 (hereinafter the "Cigarette Act") expressly preempts state law tort claims against cigarette manufacturers for failure to warn. *See* 112 S. Ct. at 2618-22. Section 5(b) of the Cigarette Act provides that "[n]o *requirement* or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the Act]." 15 U.S.C. § 1334(b) (1988) (emphasis added). Rejecting the petitioner's argument "that common law damages actions do not impose 'requirement[s] or prohibition[s],' " the Court found that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone*, 112 S. Ct. at 2620.

[3] District court proceedings are being held in abeyance pending the outcome of this interlocutory appeal.

product's inert ingredients somehow "poisoned" him or otherwise created a health hazard. Indeed, if as Petitioners assert, Mr. Papas "was repeatedly and continuously drenched" by the product, he must have misused it rather than followed the label warnings, precautionary measures and directions for use approved by the U.S. Environmental Protection Agency ("EPA") pursuant to FIFRA. Pet. at 3.[4]

Petitioners' Complaint "asserted liability based on negligence, strict liability, and breach of an implied warranty of merchantability. Each of these claims was, in whole or in part, a claim of inadequate labeling for alleged dangers arising from exposure to the pesticides." *Papas II*, 985 F.2d at 517 (citing *Papas I*, 926 F.2d at 1020).[5] Contrary to the impression created by the petition for certiorari, there are no allegations in the Complaint (and no basis for Petitioners' insinuations) that Zoecon concealed product composition information from or made misrepresentations to EPA; nor have Petitioners alleged that Zoecon provided "non-labeling" warnings (e.g., point-of-sale signs, consumer notices), inadequate or otherwise.

The district court granted Zoecon's motion for partial summary judgment, holding that "any cause of action based on the defendant's failure to warn is preempted" by FIFRA. Pet. App. at 29a. On interlocutory appeal, the Eleventh Circuit affirmed. *Papas I*, 926 F.2d at 1021, 1027. The court of appeals passed over the question of express preemption in that pre-*Cipollone* decision. *Id.* at 1024. Instead, based on FIFRA's language, structure, purpose, and legislative history, the court concluded "that

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[4] Petitioners have filed a separate action against the supplier of the allegedly harmful inert ingredient in Zoecon's product. *Papas v. Koch Ref. Co.*, No. 90-790-CIV-J-16 (M.D. Fla. filed Sept. 6, 1990). That case also is being held in abeyance.

[5] As Petitioners note, their claims against The Upjohn Co., manufacturer of another veterinary product used by Mr. Papas, have been voluntarily dismissed. *See* Pet. at 3 n.2.

the federal government has occupied the entire field of [pesticide] labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions," and also "that jury awards of damages in such tort actions would result in direct conflict with federal law." *Id.* at 1024, 1025.[6] Five days after issuing its landmark opinion in *Cipollone*, the Supreme Court summarily vacated the Eleventh Circuit's judgment in *Papas I* and remanded the case for further consideration in light of *Cipollone*. *Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992).[7]

As this Court recently noted, *Cipollone* held that a "federal statute barring additional 'requirement[s] . . . "imposed under state law"' pre-empts common-law claims." *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737-38 (1993) (quoting *Cipollone*, 112 S. Ct. at 2620). FIFRA is such a statute. Section 136v(b), entitled "Uniformity," provides that a

> State shall not impose or continue in effect *any requirements* for labeling or packaging *in addition to or different from* those required under [FIFRA].

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[6] The court found in *Papas I* that "a jury determination . . . that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate." 926 F.2d at 1025. The court also found that the "case-by-case, state-by-state outside pressure on the regulatory process" resulting from "jury-found 'inadequacies' in labeling" would "hinder the development of an orderly, systematic, and uniform nationwide labeling scheme." *Id.* at 1026.

[7] Four months later, the Supreme Court took identical action in another pre-*Cipollone* FIFRA preemption case, *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.) ("*Arkansas-Platte I*"), *vacated and remanded*, 113 S. Ct. 314 (1992), *previous opinion adhered to*, 981 F.2d 1177 (10th Cir. 1993) ("*Arkansas-Platte II*"), *petition for cert. filed sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784). More recently the Court denied certiorari in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993), a post-*Cipollone* FIFRA preemption case.

7 U.S.C. § 136v(b) (1988) (emphasis added).[8] Congress intended § 136v(b) "to completely preempt State authority in regard to labeling and packaging." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971); *see also* S. Rep. No. 838, 92d Cong., 2d Sess. 30 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4021 (the provision "preempts any State labeling or packaging requirements differing from such requirements under the Act"). Thus, as this Court explained in its only opinion on FIFRA preemption, pesticide labeling "fall[s] within an area that FIFRA's 'program' preempts." *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991) (FIFRA does not preempt local government use restrictions).[9]

On remand, the Eleventh Circuit adhered closely to the preemption principles and analytical framework set forth in *Cipollone*:

> To determine FIFRA's pre-emption of the Papases' claims we will "only identify the domain expressly pre-empted" by FIFRA section 136v. *See Cipollone*, 505 U.S. at ——, 112 S.Ct. at 2618.
>
> . . . Section 136v(b) pre-empts those of the Papases' state law claims which constitute "requirements for labeling or packaging in addition to or different from" the labeling and packaging requirements imposed under FIFRA. *Cipollone* convinces

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[8] FIFRA defines "labeling" broadly to include not only the "label" (i.e., the sheet physically attached to the pesticide's container), but also "all other written, printed, or graphic matter . . . accompanying the pesticide . . . at any time." 7 U.S.C. § 136(p)(2).

[9] FIFRA differentiates between a state's authority to regulate pesticide "sale or use," which is preserved by § 136v(a) of FIFRA, and a state's imposing additional or different labeling requirements, which is expressly preempted by § 136v(b). *Compare* 7 U.S.C. § 136v(a) *with* § 136v(b). Section 136v(a) does not extend to regulation of labeling; indeed, its inclusion in FIFRA was necessitated by Congress' express preemption of state labeling requirements. *See Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. at 2486.

> us that the term "requirements" in section 136v(b) "sweeps broadly and suggests no distinction between positive enactments and the common law." *Cipollone*, at ——, 112 S.Ct. at 2620. Common law damages awards are one form of state regulation and, as such, are "requirements" within the meaning of section 136v. *See Id.; Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's "labeling or packaging" failed to meet a standard "in addition to or different from" FIFRA requirements, section 136v pre-empts the claims.

Papas II, 985 F.2d at 518. Analyzing each of Petitioners' failure to warn theories, the court found that they, "like the failure to warn claims in *Cipollone*, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids." *Id.*

Section 136v(b) vests EPA with "the sole and exclusive right to regulate pesticide label[ing]." *Papas I* at 1024. This enables EPA, which has the necessary resources, expertise and experience, to determine what warnings a pesticide product's manufacturer should provide, and ensure that the product's labeling, including the warnings on it, will be uniform (i.e., identical) throughout the United States. *See id.* at 1025 n.6. Uniformity promotes user comprehension and safety. In this manner, § 136v(b) helps to accomplish FIFRA's principal purpose, which is "to protect man and his environment." S. Rep. No. 838, at 1, *reprinted in* 1972 U.S.C.C.A.N. at 3993.[10]

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[10] This Court has described FIFRA as "a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Virtually every pesticide product sold or distributed in the United States must be registered and labeled pursuant to FIFRA. 7 U.S.C. 136a(a), (c)(5). Before granting a registration, EPA

The petition erroneously asserts that pesticide manufacturers "have wide latitude to decide the language of pesticide labels." Pet. at 4. In reality, EPA exercises absolute control over every word in every warning statement on every pesticide label. "EPA has regulated almost every aspect of pesticide labeling," including "the content, placement, type size, and prominence of the warnings and precautionary statements." *Papas I*, 926 F.2d at 1024; *see* 40 C.F.R. pt. 156 (1992). When a manufacturer applies to EPA for registration of a pesticide product, it must submit along with the application *draft* labeling prepared in accordance with EPA's pt. 156 labeling regulations. *See* 40 C.F.R. § 152.50(e) (1992).[11] EPA not only determines whether the draft labeling complies with the detailed requirements of pt. 156 (e.g., whether it includes the basic precautionary statements set forth in § 156.10(h)(2)(i)(B)), but also what specific additional warnings or precautions the manufacturer should provide, how they should be worded, where on the labeling they

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must find that the product, when used in accordance with its labeling, will not cause "unreasonable adverse effects." *Id.* §§ 136a(c)(5), 136(bb). This includes a determination by EPA that the product is not "misbranded." *See* 7 U.S.C. § 136(q); 40 C.F.R. § 152.112(f) (1992). A product is misbranded if, *inter alia*, its labeling "does not contain a warning or caution statement which may be necessary," or "does not contain directions for use which . . . are adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(F), (G).

[11] EPA's pt. 156 regulations provide that pesticide labeling "must show clearly and prominently . . . [w]arning or precautionary statements *as prescribed*" by EPA. 40 C.F.R. § 156.10(a)(1)(vii) (emphasis added). These encompass hazards to any persons who may be exposed to a pesticide. *See id.* § 156.10(h), (i). "Where a hazard exists to humans . . . precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage." *Id.* § 156.10(h)(2)(i)(A).

should appear, and even what type size should be utilized.[12]

After EPA approves the initial registration of a pesticide product, it will require the manufacturer to amend the product's labeling to incorporate additional EPA-specified warnings, precautionary statements, or other information when and if EPA determines they are warranted. *See* 40 C.F.R. § 152.144 ("[T]he Agency may require a registrant to change a product's . . . labeling . . . to be reregistered and to maintain [the] registration in compliance with FIFRA.").[13] Under no circumstances are pesticide manufacturers allowed to add, delete, or modify warnings without EPA's prior review and approval. *See* 7 U.S.C. § 136j(a)(2)(A) (1988); 40 C.F.R. § 152.44.[14]

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[12] Each pesticide product represents its own unique combination of active and inert ingredients, type of formulation, physical and chemical characteristics, environmental behavior, uses, and toxicity. For this reason, it would have been impossible for Congress to specify in the text of FIFRA across-the-board label warnings applicable to all pesticide products. Instead, EPA regulates label warnings and precautionary information on a product-by-product basis, using the pt. 156 regulations as its minimum requirements. *See* 49 Fed. Reg. 37,960, 37,965 (1984). This is why, as Petitioners note, even pesticide products containing the same active ingredient may have different labels. *See* Pet. at 23.

[13] As part of the congressionally mandated FIFRA reregistration process, EPA reviews updated health and safety data needed to reassess whether a pesticide's labeling continues to meet the statutory requirements for registration. *See* 7 U.S.C. §§ 136a-1, 136a(c)(5)(B). If any labeling changes are warranted, EPA requires the manufacturer to make them in order to maintain the registration. *See* 7 U.S.C. § 136a-1(g). The active ingredient in Zoecon's product, like most of the 600 other active ingredients registered under FIFRA, is currently undergoing reregistration review. EPA also has an interim review procedure so that it can address special health or safety concerns at any time and require labeling changes as may be necessary. *See* 7 U.S.C. § 136a(c)(8); 40 C.F.R. pt. 154 (1992).

[14] Petitioners misleadingly assert that "[i]n many cases, a manufacturer need only notify the EPA that it is making the revision,"

The petition erroneously implies that EPA would have required additional label warnings had it been informed that Zoecon's product contained benzene. *See* Pet. at 5 n.4. Benzene in a pesticide product is of toxicological concern, and its presence needs to be disclosed to EPA and identified on a pesticide's labeling, only when it is deliberately added to the product as an inert ingredient, *not* where as here, there is a toxicologically insignificant amount (0.01% by weight) present as an impurity within one of the product's inert ingredients.[15] *See* 40 C.F.R. § 158.155 (1992) (EPA regulation regarding submission of product composition data); 52 Fed. Reg. 13,305, 13,305-07 (1987) (EPA policy statement on inerts discussing benzene). Petitioners' own toxicology expert testified at a preliminary hearing in this case that the benzene in Zoecon's product was not added as an inert ingredient, but was merely an impurity (a side reaction product) created during manufacture of one of the product's inert ingredients. Hearing Transcript at 12-13, *Papas v. Upjohn Co.*, No. 88-116-Civ-J-14 (M.D. Fla. Jan. 11, 1989) (testimony of William L. Marcus). Petitioners gloss over this crucial distinction and discuss the trace amount of benzene impurity in Zoecon's product as if it were an (intentionally added) inert ingredient. *See* Pet. at 4.

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and that "[o]ther revisions require no notification at all." Pet. at 4. While EPA's regulations permit a manufacturer to correct typographical errors and make certain other minor label modifications that do not require review of scientific data, those same regulations make it clear that any proposed additions, deletions, or changes to warnings or precautionary statements must be reviewed and approved by EPA. *See* 40 C.F.R. §§ 152.46(a)(1); 152.130(b).

[15] EPA regulations define "inert ingredient" as "any substance . . . other than an active ingredient, which is *intentionally* included in a pesticide product." 40 C.F.R. § 158.153(f) (1992) (emphasis added). An "impurity" is "any substance . . . in a pesticide product *other than* an active ingredient or an inert ingredient, including . . . side reaction products [and] contaminants." *Id.* § 158.153(d) (emphasis added).

SUMMARY OF ARGUMENT

There is no split of authority which meets this Court's criteria for granting certiorari. *Cipollone v. Liggett Group* has resolved whatever judicial "confusion and conflict" may have previously existed on FIFRA preemption of tort claims. In addition to the Eleventh Circuit, the First, Seventh and Tenth Circuits have held in light of *Cipollone* that § 136v(b) of FIFRA preempts failure to warn claims against pesticide manufacturers. No federal circuit, and no state supreme court, has held to the contrary since *Cipollone* was decided. The only court of appeals case ever to hold that such claims are not preempted was a much criticized, 1984 D.C. Circuit opinion which *Cipollone* effectively overruled.

Each of the other "splits" identified in the petition is a bogus conflict involving a subsidiary issue. For example, no court of appeals decision draws a distinction between tort claims for "inadequate labeling" and tort claims for "failure to warn" by means other than labeling. As the Eleventh Circuit recognized, *any* claim for inadequate warnings necessarily challenges the adequacy of the warnings on a pesticide product's EPA-approved labeling, and as a result, there are no warning claims "unrelated" to labeling.

Similarly, there is no judicial conflict created by the Eleventh Circuit's holding that a plaintiff cannot circumvent preemption by asserting that he intends to prove a pesticide manufacturer should have provided additional product composition information to EPA. Nor is there any conflict as to whether a plaintiff can avoid preemption by alleging that the manufacturer's failure to warn is a breach of an implied warranty.

Contrary to the assertions in the petition, the court of appeals gave full effect to the preemption principles established in *Cipollone*. On remand, the court narrowly interpreted in light of *Cipollone* the plain language of § 136v(b), and then proceeded to analyze Petitioners'

state law failure to warn claims and theories to determine whether each imposes additional or different labeling requirements within the meaning of that preemption provision. Having conducted this preemption analysis, the court held that FIFRA expressly preempts all of Petitioners' failure to warn claims against Respondent Zoecon Corp., since each of those claims in effect is a claim for inadequate labeling and would impose additional or different labeling requirements, but does not preempt those of Petitioners' product liability claims that are unrelated to labeling or warnings. The Eleventh Circuit's conclusion is correct and does not warrant Supreme Court review.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SPLIT OF AUTHORITY ON FIFRA PREEMPTION WARRANTING SUPREME COURT REVIEW

A. There Is No Post-*Cipollone* Conflict Among the Courts of Appeals or With a State Court of Last Resort

Petitioners concede this Court "recogniz[ed] that its analysis in [*Cipollone*] would shape the resolution of FIFRA preemption." Pet. at 9. Indeed, *Cipollone* has afforded the lower courts (and litigants) all the guidance they need on the question of whether FIFRA preempts state law failure to warn claims against pesticide manufacturers. There is no reason for the Court to revisit federal preemption of failure to warn claims so soon after *Cipollone*.

Petitioners' assertion that "there is a significant dispute about how to apply *Cipollone*" is wrong, at least as far as FIFRA preemption is concerned. Pet. at 18. In addition to the Eleventh Circuit in *Papas II*, three other circuits have addressed FIFRA preemption of failure to warn claims in light of *Cipollone*, and like the court of appeals below, *each* has held unequivocally that FIFRA preempts such claims. *See King v. E.I. DuPont de*

Nemours & Co., No. 92-2381, 1993 WL 232939 (1st Cir. July 7, 1993); *Shaw v. Dow Brands, Inc.*, No. 92-2323, 1993 WL 166324 (7th Cir. May 18, 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993) (*"Arkansas-Platte II"*), *petition for cert. filed*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784). Furthermore, one state supreme court has considered the issue since *Cipollone* was decided, and it too found preemption. *See Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993). The Eleventh Circuit's finding of preemption in *Papas II* is consistent with each of these decisions:

1. The plaintiff in *Arkansas-Platte* alleged that its property, the site of a former wood treating plant, had been contaminated by a wood preservative pesticide because, *inter alia*, the pesticide's manufacturer failed to provide adequate warnings about the product's environmental hazards. On remand from this Court for further consideration in light of *Cipollone*, the Tenth Circuit held "[t]o the extent that state tort claims . . . require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Arkansas-Platte II*, 981 F.2d at 1179. The court of appeals explained that its previous finding of preemption is "re-enforced" by *Cipollone* "because the labeling provision of [FIFRA] § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, which the [Supreme] Court held constituted a preemption of state common law labeling and duty to warn claims." *Id.* (citation omitted); *see Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992) (*"Arkansas-Platte I"*). The Tenth Circuit relied on *Cipollone* in rejecting the plaintiff's argument that the term "requirements" in § 136v(b) is limited to "positive enactments":

> [A] state common law duty to warn is nothing more than *a duty to label a product* to provide information. In that sense, *the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden.* . . . Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. *Cipollone*, —— U.S. at ——, 112 S.Ct. at 2620 (state regulation can be accomplished by an award of damages or by legislative enactment). . . .
>
> We hold *Cipollone* supports our previous judgment in this case.

Id. (emphasis added).

2. In *Shaw v. Dow Brands* the plaintiff sued the manufacturer of a bathroom disinfectant, claiming that he became ill after using the product because its EPA-approved label did not contain adequate warnings.[16] The Seventh Circuit held that the plaintiff's arguments against preemption "evaporated last summer when the Supreme Court decided *Cipollone*." 1993 WL 166324, at *6. The court explained as follows:

> In order to succeed in the wake of *Cipollone*, [the plaintiff] would have to show that FIFRA's preemption language is less sweeping than the language of the 1969 Cigarette Act. Yet *we can discern no significant distinction at all*—FIFRA says that "[s]uch State shall not impose . . . any requirements for labeling or packaging in addition to or different from those required . . .," while the cigarette law says "[n]o requirement[s] or prohibition[s] . . . imposed under State law" shall be permitted. Both seem equally emphatic: "[n]o requirements or prohibitions" is just another way of saying a "[s]tate shall not impose . . . any requirements." *Not even the*

[16] Disinfectants are regulated as pesticides under FIFRA. *See* 7 U.S.C. § 136(u).

> *most dedicated hair-splitter could distinguish these statements. If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA.* The Tenth Circuit recently held the same thing. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993) ("We believe also the prohibition of 'any' requirement is the functional equivalent of 'no' requirement. We see no difference between the operative effect of the two acts"). Because *Cipollone* destroyed whatever argument *Shaw* might have had about pre-emption, we are compelled to affirm the district court decision that FIFRA bars this action.

Id. (emphasis added).

3. *King v. DuPont* is the most recent court of appeals decision on FIFRA preemption.[17] The plaintiffs alleged that they suffered various ailments as a result of their occupational use of herbicides. They sued several pesticide manufacturers, alleging that the defendants failed to provide adequate warnings. After extensive discussion of *Cipollone,* the First Circuit held "that, in light of *Cipollone,* FIFRA preempts the plaintiffs' state law tort claims based on the defendants' alleged failure to provide adequate warnings about the health hazards of the herbicides they manufactured and sold." 1993 WL 232939, at *4. The court explained that

> [t]he warnings on the labels of the herbicides . . . were approved by the EPA, as FIFRA required. If the plaintiffs could recover on their state law claims that, despite this labeling, the defendants had failed to provide adequate warning, *those additional warnings necessarily would be "in addition to or different from those required under* [*FIFRA*]." . . .

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[17] *King* was decided after the petition for certiorari in this case was filed.

> . . . The FIFRA language prohibiting the states from "impos[ing] or continu[ing] in effect any requirements," 7 U.S.C. § 136v(b), is *virtually indistinguishable* from the state-imposed "requirement" language that *Cipollone* held preempted the state common law tort claims based on inadequate warning. . . .
>
> Our conclusion accords with the decisions of the three courts of appeals that, since *Cipollone*, have decided the question.

Id. at *4, *5 (emphasis added).

Thus, as Petitioners necessarily acknowledge, there is no post-*Cipollone* split among the circuits. *See* Pet. at 13 n.12.[18] Nor is there any post-*Cipollone* conflict with a state court of last resort. In *Davidson v. Velsicol Chemical Corp.*, the Nevada Supreme Court found implied preemption of state tort claims based on inadequate labeling. 834 P.2d at 937-38. Although Petitioners try to create a conflict between courts that have found express preemption and those that have found implied preemption, the Supreme Court observed only one week before *Cipollone* that those "pre-emption categories are not 'rigidly distinct.'" *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2386 n.2 (1992) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)); *see Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("Regardless of the avenue we

[18] It should be noted the Fourth Circuit concluded in a post-*Cipollone* decision affirming preemption of failure to warn claims under the Federal Hazardous Substances Act ("FHSA") that its pre-*Cipollone* finding of FIFRA preemption in *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *defendant's renewed motion for summary judgment granted*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *notice of appeal docketed*, No. 93-1003 (4th Cir. Dec. 30, 1992), "comports with that in *Cipollone*." *Moss v. Parks Corp.*, 985 F.2d 736, 740 n.2 (4th Cir.), *cert. denied*, 61 U.S.L.W. 3852 (U.S. June 21, 1993) (No. 92-1736). The Fourth Circuit explained that the preemption provisions in FIFRA and FHSA are "nearly identical." *Id.* at 741 n.3.

follow—whether explicit or implied pre-emption—this state law cause of action cannot be sustained.") (holding that ERISA both expressly and impliedly preempts employee's state law wrongful discharge claim).

Therefore, the post-*Cipollone* "confusion and conflict among the lower courts" which Petitioners assert "[o]nly this Court can eliminate" simply does not exist. Pet. at 9, 14.[19] Because there is no post-*Cipollone* conflict on whether FIFRA preempts failure to warn claims, the petition should be denied.[20]

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[19] The thirteen other post-*Cipollone* decisions cited by Petitioners (all but two of which find preemption) are opinions from federal district courts, intermediate state appellate courts, or state trial courts. *See* Pet. at 12 n.11, 13 n.12 & n.13.

[20] The only court of appeals case holding that FIFRA does not preempt failure to warn claims against pesticide manufacturers was the widely criticized, 1984 D.C. Circuit opinion in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). "In deciding *Ferebee*, the District of Columbia Circuit did not have the benefit of the Supreme Court's subsequent analysis and ruling in *Cipollone*." *King v. DuPont*, 1993 WL 232939, at *6. *Ferebee* held that FIFRA does not preempt inadequate labeling claims on the theory that a damages award "is not equivalent to a direct regulatory command" to change the labeling, and hence, does not pose "requirements" for labeling within the meaning of § 136v(b). According to *Ferebee*, a pesticide manufacturer, when confronted with the prospect of continued state tort law liability for inadequate labeling, supposedly has a "choice of reaction": Rather than change the "tortious" label, the manufacturer may prefer to choose leaving it the way it is, while "simultaneously paying damages to successful tort plaintiffs." 736 F.2d at 1541. The Supreme Court made it clear in *Cipollone*, however, that express preemption of state law "requirements," as that term is used in a federal statute's preemption provision, encompasses requirements imposed through state tort law claims for damages. *See Cipollone*, 112 S. Ct. at 2620. This once and for all lays to rest *Ferebee*'s "choice of reaction" theory. *See Shaw v. Dow Brands*, 1993 WL 166324, at *6 ("[*Cipollone*] held that sweeping congressional efforts to pre-empt state regulation also bar state damages claims."); *Stamps v. Collagen Corp.*, 984 F.2d 1416, 1424-25, 1425 n.9 (5th Cir. 1993), *petition for cert. filed*, 61 U.S.L.W. 3870 (U.S. June 16, 1993) (No. 92-1989) (finding in medical device preemption

B. The "Several Different Splits" Described by Petitioners Are Contrived

Petitioners also erroneously contend that the "lower courts" are split on three ancillary FIFRA preemption issues. *See* Pet. at 14, 16, 17. None of these so-called "splits" is genuine or warrants Supreme Court review.

1. According to Petitioners, *Papas II* conflicts with two pre-*Cipollone* decisions "on whether FIFRA preempts state requirements with respect to warnings that do not accompany the product." Pet. at 14. The Eleventh Circuit held in *Papas II* that FIFRA preempts not only claims which directly challenge the adequacy of the warnings on a pesticide's labeling, but also "claims challenging the adequacy of warnings on materials other than the

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case that *Ferebee* did not survive *Cipollone*); *Casper v. E.I. du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 n.1 (E.D. Wash. 1992) (finding express preemption under § 136v(b) of FIFRA and noting *Ferebee*'s holding "that a verdict awarding damages 'is not equivalent to a direct regulatory command' . . . . appears to have been rejected in *Cipollone*").

Ferebee further held that a common law claim for inadequate labeling is not preempted because "tort recovery . . . may also promote legitimate regulatory aims" such as exposing dangers of pesticides or inducing label revisions. 736 F.2d at 1541. This Court subsequently observed, however, that in determining whether a common law tort claim conflicts with federal law, "it is not enough to say that the ultimate goal of both federal and state law is [the same] . . . . [a] state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (common law nuisance suit which could require adoption of different standards than those imposed by EPA to avoid future liability preempted by federal environmental protection statute); *see Papas I*, 926 F.2d at 1021. "The inevitable result of such suits would be that [the] States could do indirectly what they could not do directly—regulate . . . ." *International Paper Co. v. Ouellette*, 479 U.S. at 495.

The only state court of last resort to reject FIFRA preemption of failure to warn claims was *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 144 (Ark. 1992), a pre-*Cipollone* decision which relied on *Ferebee*'s now-defunct "choice of reaction" theory.

label or package of a product." 985 F.2d at 519. The court found the latter are preempted because they "necessarily imply that the labeling and packaging fail to warn the user." *Id.* As a result, the court explained that "[i]f a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, *its duty to warn is satisfied, and the adequate warning issue ends.*" *Id.* (emphasis added). This holding, which establishes that *any* failure to warn claim is a claim for inadequate labeling, in no way conflicts with either the Ninth or Second Circuit cases cited by Petitioners. *See* Pet. at 14, 15.[21]

Chemical Specialties Manufacturers Association v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S. Ct. 80 (1992), involved a challenge to a requirement under California Proposition 65 that manufacturers of consumer pesticides and other products provide certain state-specified point-of-sale warnings to the public. The Ninth Circuit held that FIFRA does not preempt that statutory warning requirement. *See* 958 F.2d at 944-48. *Allenby* did not involve the issue of whether tort claims for allegedly inadequate point-of-sale warnings are preempted, and, therefore, does not conflict with the Eleventh Circuit's holding in *Papas II* that such claims are preempted. *See* 985 F.2d at 519. Furthermore, the Ninth Circuit based its ruling on the grounds that point-of-sale signs are not "labeling," and that "there would be no need for companies to change their labels to comply with Proposition 65, *unlike the need to change labels in order to avoid state tort liability.*" *Allenby*, 958 F.2d at 948 (emphasis added). The court explained that "[s]ince FIFRA expressly preempts additional state labeling requirements, the *tort suits could circumvent the preemption clause by*

[21] As discussed above, Petitioners nowhere allege that Zoecon provided warnings which did not accompany its product. Warnings that did accompany the product would fall within FIFRA's broad definition of "labeling," and hence, even within Petitioners' artificially narrow category of "inadequate labeling claims." *See* 7 U.S.C. § 136(p)(2).

effectively requiring additional labeling to avoid tort liability even though the states do not expressly require the additional labeling." *Id.* (emphasis added). This is consistent with the holding in *Papas II* that common law damages awards are labeling "requirements" within the meaning of § 136v(b). *See* 985 F.2d at 518.

Petitioners' other supposedly conflicting case, *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989), did not involve warnings provided by pesticide manufacturers. The Second Circuit held that FIFRA does not preempt a state agency from promulgating pesticide use regulations requiring commercial *applicators* to provide certain notifications to the general public about their pest control activities. *See Jorling*, 874 F.2d at 119. There is no suggestion in the case that manufacturers of FIFRA-labeled pesticide products can or should be subject to additional warning requirements imposed by state law, much less through state common law tort actions. Furthermore, the Second Circuit emphasized that § 136v(b) of FIFRA "place[s] the 'labeling' of pesticides within the *singular province of the EPA*"; that "FIFRA's prohibition of state labeling 'in addition to or different from' that approved by the EPA has as 'its main focus . . . *preserving the force of the information contained in the FIFRA label*' "; and that "FIFRA 'labeling' is designed to be read and followed *by the end user*" (e.g., Petitioner Papas). 874 F.2d at 117, 119 (emphasis added). Again, this is consistent with *Papas II*. *See* 985 F.2d at 518 ("FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices.").

2. Petitioners also erroneously assert that *Papas II* creates a split "on whether FIFRA preempts state common law claims related to the manufacturer's failure to provide the EPA with complete and accurate information." Pet. at 16. The Eleventh Circuit held that Petitioners cannot circumvent § 136v(b) by asserting they intend to prove that Zoecon failed to disclose to EPA

that the product contained (a minute amount of) benzene. *See Papas II*, 985 F.2d at 519 ("[I]t is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made."); *see also Papas I*, 926 F.2d at 1026 n.8.

According to Petitioners, this somehow conflicts with the Fourth Circuit's pre-*Cipollone* decision in *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), an agricultural crop damage case.[22] The petition quotes out of context *dicta* from *Worm* to the effect that a state duty "to maintain a label in accordance with the federal standards" would not conflict with FIFRA or be preempted. *See* Pet. at 17 (quoting *Worm*, 970 F.2d at 1309). This merely refers to state requirements that are "not 'different from' the federal standard." *Worm*, 970 F.2d at 1308.[23] In contrast, the Fourth Circuit's holding makes it clear that tort claims for failure to warn necessarily impose state labeling requirements which *are* different from the federal requirements, and hence, preempted:

> [S]urely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation *requiring the insertion of a specific warning on the pesticide label*. . . .
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> . . . .

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[22] After the Fourth Circuit rendered its opinion in *Worm*, the district court issued a decision on remand, which the *Worm* plaintiffs now have appealed. *See Worm v. American Cyanamid Co.*, No. HAR-90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *notice of appeal docketed*, No. 93-1003 (4th Cir. Dec. 30, 1992). Accordingly, the court of appeals will have the opportunity to consider the impact of *Cipollone*, if any, on its previous decision.

[23] For example, a state requirement that a pesticide manufacturer distribute its product with EPA-approved labeling would be no different from the federal standard. The Fourth Circuit's *dictum* appears to suggest that a state tort claim for breach of such a state requirement would not be preempted. (The record in *Papas* establishes that Zoecon at all times distributed its product with EPA-approved labeling.)

> . . . [T]he language of § 136v(b) *manifestly ordains the preemption* of the establishment or enforcement of *any common law duty* that would impose a labeling requirement inconsistent with those established by FIFRA or the EPA in its regulations. If to avoid breaching a state duty a pesticide producer *is required to revise its pesticide labeling,* then the duty, common law or otherwise, is *preempted by § 136v(b).*

Worm, 970 F.2d at 1308-09 (citations omitted) (emphasis added). This too is consistent with *Papas II. See* 985 F.2d at 518 (§ 136v(b) preempts state law claims "which constitute 'requirements for labeling or packaging in addition to or different from' the labeling and packaging requirements imposed under FIFRA").

3. Petitioners assert that *Papas II* conflicts with the holding of an intermediate state court in Florida "on whether FIFRA preempts breach of warranty claims." Pet. at 17 (citing *Brennan v. Dow Chem. Co.,* 613 So.2d 131 (Fla. Dist. Ct. App. 1993)). Such a conflict would not meet this Court's standards for review. *See* S. Ct. R. 10.1. Furthermore, there is no conflict between the cases. *Papas II* holds that FIFRA preempts claims for breach of implied warranty of merchantability to the extent they are based on failure to warn. *See* 985 F.2d at 519-20. Unlike express warranties, which are voluntary contractual commitments, "implied warranties of merchantability arise by operation of law." *Id.* at 519; *see Cipollone,* 112 S. Ct. at 2622. The Florida case cited by Petitioners holds that FIFRA preempts claims for inadequate labeling, but not "the breach of warranty claim, since it was a common law claim arising out of a *voluntary contractual commitment.*" *Brennan,* 613 So. 2d at 132 (emphasis added). This is consistent with *Papas II,* whose finding of preemption is directed to involuntary warranties. Moreover, it is not clear from the *Brennan* decision whether the breach of warranty claim in that case was even based on a failure to warn theory.

II. THE COURT OF APPEALS REACHED THE CORRECT CONCLUSION IN LIGHT OF *CIPOLLONE*

A. The Court Properly Interpreted § 136v(b) of FIFRA

Pursuant to this Court's remand, the Eleventh Circuit analyzed "[i]n the light of *Cipollone* . . . FIFRA's pre-emptive effect on the Papases' claims under the express pre-emption doctrine." *Papas II*, 985 F.2d at 517. Recognizing that "[l]ike the statutes at issue in *Cipollone*, FIFRA contains a provision explicitly addressing, and providing a reliable indicium of, state authority," the court focused on FIFRA's preemption provision, § 136v(b), to " 'identify the domain expressly pre-empted.' " *Id.* at 517, 518 (*quoting Cipollone*, 112 S. Ct. at 2618).[24]

In *Cipollone* the Supreme Court interpreted narrowly the 1969 Cigarette Act's preemption provision, which prohibits states from imposing a "requirement or prohibition," but still found that it "easily encompass[es] obligations that take the form of common law rules." *Cipollone*,

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[24] There is no basis for Petitioners' contention that the court "failed to . . . discern congressional intent." Pet. at 19. The court carefully reviewed the language of § 136v(b), which is the best indication of Congress' preemptive intent. *See CSX Transp., Inc. v. Easterwood*, 113 S. Ct. at 1737 ("If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains *the best evidence of Congress' pre-emptive intent.*") (emphasis added). Furthermore, the court incorporated by reference its previous analysis of FIFRA's legislative history, which emphasized Congress' goal of achieving national labeling uniformity through preemption of any additional or different state requirements for labeling. *See Papas II*, 985 F.2d at 517 n.1 (citing *Papas I*, 926 F.2d at 1022-25). The court explained that the "objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136v(b) . . . Congress added the heading 'Uniformity' to this section." *Papas I*, 926 F.2d at 1025; *see* Pub. L. No. 100-532, sec. 801(m)(2), 102 Stat. 2654, 2682 (1988). This rebuts Petitioners' assertion that Congress somehow "ratified" the D.C. Circuit's heavily criticized, and now effectively overruled, 1984 *Ferebee* decision. Pet. at 22.

112 S. Ct. at 2620. Based on *Cipollone*, the Eleventh Circuit found that FIFRA's prohibition against state imposition of "requirements," like the Cigarette Act's, " 'sweeps broadly and suggests no distinction between positive enactments and common law.' " *Papas II*, 985 F.2d at 518 (quoting *Cipollone*, 112 S. Ct. at 2620). Each of the three other circuits which has considered § 136v(b) in light of *Cipollone* also has held that its preemptive scope is as broad as the Cigarette Act's preemption provision. *See King v. DuPont*, 1993 WL 232939, at *4; *Arkansas-Platte II*, 981 F.2d at 1179; *Shaw v. Dow Brands, Inc.*, 1993 WL 166324, at *6.

Petitioners argue that the Eleventh Circuit should have interpreted § 136v(b) more narrowly in order to exclude common law claims. *See* Pet. at 20. Under Petitioners' convoluted interpretation, § 136v(b) is limited to positive enactments (and excludes common law claims) because it begins with the phrase "Such state," thereby supposedly incorporating § 136v(a), in which the word "regulation" appears. To the contrary, "[t]he word 'Such' in subsection (b) does not limit to state regulation the state 'requirements for labeling or packaging' which that section preempts." *King v. DuPont*, 1993 WL 232939, at *4. The Supreme Court found in *Wisconsin Public Intervenor v. Mortier* that § 136v(a) does not serve the function of limiting the types of state labeling requirements which § 136v(b) preempts; instead, it merely preserves the inherent authority of states to regulate sale and use of pesticides where "a narrow pre-emptive overlap might occur." 111 S. Ct. at 2486.[25]

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[25] Section 136v(a) provides that "[a] State may *regulate* the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the *regulation* does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a) (emphasis added). The word "regulation" in the second clause of § 136v(a) refers back to the verb "regulate" in the first clause, and thus, plainly means the act of regulating, which as *Cipollone* con-

Further, Petitioners' argument that FIFRA's preemption provision is narrower than the Cigarette Act's because the latter sets forth the text of the required warnings is a red herring. *See* Pet. at 8-9, 23. Unlike cigarettes, which are a relatively uniform product amenable to across-the-board warnings for the hazards they pose, pesticide products differ significantly from each other in terms of composition, use, and toxicity. *See supra* n.12. The fact that Congress vested EPA with the responsibility to devise appropriate warnings for each pesticide product in no way affects the scope of § 136v(b) or impairs the Eleventh Circuit's comparison of that preemption provision with the Cigarette Act's.

Petitioners also assert that common law claims do not impose "requirements in addition to or different from" FIFRA because they supposedly help protect health and the environment or are consistent with FIFRA's requirements. Pet. at 20-21, 27-28. This Court has held, however, that "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. at 2387; *see Papas II*, 985 F.2d at 519. Therefore, "[a] state law action which shares the same purpose

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firms can take the form of common law damages claims as well as positive enactments. Furthermore, contrary to Petitioners' misreading of *Cipollone*, the Supreme Court was not making a general pronouncement on the meaning of the term "regulation" in federal statutes when it observed that "[r]ead against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the [1964] Surgeon General's report [on smoking and health], the term 'regulation' most naturally refers to positive enactments by those bodies, not to common law damages actions." *Cipollone*, 112 S. Ct. at 2619. Instead, the Court was interpreting "regulation" solely in the context of the statement of purpose accompanying the Cigarette Act's 1965 statutory predecessor, whose preemption provision, the Court explained, Congress replaced in 1969 with the "much broader" preemption provision in the Cigarette Act. *Id.*

as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods." *Papas I*, 926 F.2d at 1026 (citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

B. The Court Considered and Rejected Each of Petitioners' Failure to Warn Claims

After finding in *Papas II* that § 136v(b) encompasses state labeling requirements imposed through common law damages claims, the Eleventh Circuit conducted the exact analysis called for by *Cipollone* to determine whether Petitioners' failure to warn claims are preempted:

> The Papases' concede that *each* of their negligence, strict liability, and breach of implied warranty counts *alleges in part that Zoecon failed to warn users* that its product contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. *Those allegations, like the failure to warn claims in Cipollone, require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product.* This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted."

Papas II, 985 F.2d at 518 (quoting *Cipollone*, 112 S. Ct. at 2621-22) (emphasis added).

Petitioners rehash their arguments against preemption by erroneously contending that the Eleventh Circuit "failed to conduct the claim-by-claim analysis required by *Cipollone*." Pet. at 24. To the contrary, the court of appeals analyzed—and rejected with good reason—each

of Petitioners' failure to warn theories. *See Papas II*, 985 F.2d at 518-20.

1. Petitioners argue that because § 136v(b) preempts additional or different state requirements for "labeling," state law claims that a manufacturer failed to provide adequate warnings by means "unrelated" to labeling are not preempted. Pet. at 24-26. The court of appeals recognized, however, that "any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff *necessarily challenge* the adequacy of the warnings provided on the product's labeling or packaging." *Papas II*, 985 F.2d at 519 (emphasis added). Because such claims "necessarily imply that the labeling and packaging failed to warn the user . . . these claims are also pre-empted by FIFRA." *Id.* Furthermore, if preemption were limited to claims which directly challenge the adequacy of labeling, a plaintiff always could circumvent § 136v(b) by alleging that a pesticide manufacturer should have provided additional or different warnings by means other than labeling. As a result, "FIFRA's language . . . preempts the state law lack-of-warning claims involved in this case." *King v. DuPont*, 1993 WL 232939, at *4.

2. Petitioners argue that failure to warn claims based on breach of an implied warranty are not preempted. *See* Pet. at 26. As the court explained, however, Petitioners misplace reliance on *Cipollone*, which only addressed claims for breach of express warranties, finding that they (unlike implied warranties) are voluntarily assumed, and hence, not state-imposed requirements subject to preemption. *See Papas II*, 985 F.2d at 519.

3. Petitioners argue that claims for "misrepresentation" (which they apparently equate to a manufacturer's unintentional non-disclosure of trace chemical impurities) are not preempted because they supposedly are consistent with certain FIFRA requirements (e.g., the requirement

not to distribute a "misbranded" pesticide). Pet. at 26-29. The court of appeals rejected this argument:

> As we noted in *Papas I*, it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made. *See Papas I, supra,* 926 F.2d at 1026 n.8. States may not interfere with the methods designed by Congress to achieve FIFRA's goals. *See Gade v. National Solid Wastes Management Association,* —— U.S. ——, ——, 112 S.Ct. 2374, 2385, 120 L.Ed.2d 73 (1992). We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures.

Papas II, 985 F.2d at 519. The court also found that "[b]ecause [Petitioners'] 'misbranding' theory is inseparable from FIFRA procedural requirements [there is] no merit in [their] contention that this theory of recovery is based on a generalized 'duty not to deceive.'" *Id.* at 518 n.2 (citing *Cipollone*, 112 S. Ct. at 2624).[26]

Therefore, having carefully analyzed each of Petitioners' failure to warn claims in light of *Cipollone*, the Eleventh Circuit correctly concluded "that FIFRA expressly preempts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging. . . . Claims that do not challenge Zoecon's labeling and packaging practices are not preempted." 985 F.2d at 520.

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[26] FIFRA makes it unlawful to sell a misbranded pesticide. *See* 7 U.S.C. § 136j(a)(1)(E). It is well settled, however, that there is no private right of action for violations of FIFRA. *See, e.g., Almond Hill School v. United States Dep't of Agric.*, 768 F.2d 1030, 1036 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its response, Zoecon relies on unsupported factual allegations and mischaracterizations of the case law in an effort to convince this Court that review of the FIFRA preemption issue is unnecessary. Contrary to Zoecon's contentions, however, the conflict over FIFRA preemption is real and clarification from this Court is urgently needed.

1. *The Conflict Among the Lower Courts Is Authentic.*

Zoecon's Opposition erroneously asserts that there is "no split of authority" on the FIFRA preemption issue. Brief in Opposition ("Opp.") at 11. As set out more fully below, Zoecon's arguments rest largely on mischaracterizations of the relevant law and the facts of this case. In fact, the preemption decision of the Eleventh Circuit presents numerous conflicts with the lower courts on all of the key FIFRA preemption issues.

Zoecon does not deny that the decision of the District of Columbia Court of Appeals in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) directly conflicts with the decision of the Eleventh Circuit below. *See* Opp. at 16. Nevertheless, Zoecon attempts to dismiss this conflict by arguing that the *Ferebee* decision was "effectively overruled" by this Court's opinion in *Cipollone v. Liggett Group*, 112 S.Ct. 2608 (1992). *See* Opp. at 16 n.20.

The decision in *Ferebee*, however, is wholly consistent with the reasoning of *Cipollone*. As Zoecon concedes, *Cipollone* mandates an express preemption analysis when the statute at issue contains an express preemption provision, such as that contained in FIFRA. Opp. at 22. The D.C. Court of Appeals engaged in an express preemption analysis in *Ferebee* and found that FIFRA does not expressly preempt state common law tort claims.

Ferebee, 736 F.2d at 1542.[1]

Zoecon's contention that *Ferebee* was "effectively overruled" rests on a wild simplification of this Court's holding in *Cipollone*: that the issue of preemption turns on Congress's use or non-use of the word "requirement." Opp. at 16 n.20. The *Cipollone* plurality, however, viewed as determinative not the 1969 Cigarette Act's use of the magic word "requirement" (as opposed to the use of the words "statement" and "require" in the 1965 Act), but Congress's overall *expansion* of language from the 1965 Act to the 1969 Act and the fact that Congress had purposefully broadened the scope of the Act's preemption provision during the legislative process.[2] *Cipollone*, 112 S.Ct. at 2620-21. Recognizing that FIFRA's language and history are quite different from that of the 1969 Cigarette Act, lower courts, in post-*Cipollone* rulings, continue to hold that FIFRA does not preempt common law claims. Pet. at 12 n.11. Plainly, the lower courts continue to be divided on this important federal question.

The conflict between the Eleventh Circuit's holding with respect to off-label warnings and the decisions of the Second and Ninth Circuits that FIFRA's preemption provision does not encompass off-label information is equally direct.[3] Pet. at 14-16,

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[1] Contrary to Zoecon's assertions, this holding was not challenged until after the lower courts issued the erroneous implied preemption rulings in the cigarette cases that were ultimately over-turned by *Cipollone*. *See* Pet. at 8-9.

[2] Were it otherwise, this Court's analysis of the differences between the two acts at issue in *Cipollone* would be reduced to Congress's arbitrary use of a "magic suffix" *(see Cipollone* at 2618, noting that the 1965 Act utilized the word "requir*ed*," and at 2619, citing the 1969 Act's reference to "requir*ements*" (emphases added)).

[3] As Zoecon concedes, the lower court's holding essentially treats "any failure to warn claims [as] a claim for inadequate labeling," including claims that challenge "the adequacy of warnings on materials other than the label or the

citing Chem. Specialties Mfrs. Ass'n. v. Allenby, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S.Ct. 80 (1992); *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989). In a patently bogus attempt to distinguish these cases, Zoecon argues that since the Ninth and Second Circuits define "labeling" differently than the court below, there is no conflict on the preemption issue. Opp. at 18-19. Zoecon's argument, however, obscures the underlying conflict: that the courts of appeals disagree about the breadth of FIFRA's "labeling" definition. Because of this difference of opinion, these courts necessarily reach different results on the FIFRA preemption question.[4]

Zoecon's discussion of the Eleventh Circuit's conflict with the Florida Court of Appeal with respect to breach of warranty claims also attempts to obscure the difference of opinion between the two courts. *See* Pet. at 17; Opp. at 21. Zoecon asserts that since the Florida Court of Appeal characterizes the breach of warranty claim as a "voluntary contractual commitment" and the court below characterizes the claim as stemming from an "involuntary" commitment, there is no inconsistency between the two decisions. Opp. at 21. This characterization of the cases, however, glosses over the source of the conflicting results in the two cases, which is a disagreement over how to characterize a breach of warranty claim. Consistent with *Cipollone*, the Florida Court of Appeal characterizes breach of warranty claims as "voluntarily undertaken." *See Cipollone*, 112 S.Ct. at 2622 (discussing express warranty) and *Brennan v. Dow Chem. Co.*, 613 So.2d 131, 132 (Fla. Dist. Ct. App. 1993) (discussing breach of warranty generally). The court below disagreed with the

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package of the product." Opp. at 17-18.

[4] Zoecon's argument that the *Jorling* decision is somehow limited to state requirements for commercial applicators and cannot be extended to manufacturers is also without merit. *See* Opp. at 19. Clearly, nothing in FIFRA singles out manufacturers for special protection from state law.

opinion of the Florida Court of Appeal and characterized implied breach of warranty claims as involuntary and, thus, preempted by FIFRA. Opp. at 21, Pet. App. at 8a-10a. These courts are plainly in conflict with respect to FIFRA preemption of breach of warranty claims.

Zoecon similarly evades the real issue with respect to the conflict of the decision below with the Fourth Circuit's holding that state actions which "impose a duty to improve a product or to maintain a label in accordance with the federal standards" are not preempted by FIFRA. *Worm v. American Cyanamid*, 970 F.2d 1301, 1308 (4th Cir. 1992), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D.Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992); Pet. at 16-17. In an apparently desperate attempt to deny the circuit split on this point, Zoecon contends that the two findings are not in conflict because Zoecon has "at all times distributed its product with the EPA-approved labeling." Opp. at 20 n.23.

Zoecon's argument is flawed in two respects. First, it is a factually based argument that ignores the Papases' contrary factual allegations that were appropriately accepted as true by the courts below for purposes of resolving the FIFRA preemption issue. Pet. App. at 6a-7a; 15a. Second, even assuming the factual truth of Zoecon's contention, the fact that a product carries a label that was accepted by the EPA at one time does not mean that the label still complies with standards set out in FIFRA. *See* Pet. at 21 n.16 (describing ongoing duty under FIFRA to modify label). Under either version of the facts, a conflict with the Fourth Circuit remains.

As even a cursory review of these cases makes clear, the conflict among the lower courts is hardly "contrived," as alleged by Zoecon. Opp. at 17. On the contrary, the split is very real, with real costs for pesticide victims and our system of justice. *See* Pet. at 18-19.

2. *Post-Cipollone Decisions Confirm That Clarification From This Court Is Needed.*

Zoecon argues that *Cipollone* affords "all the guidance" the lower courts need and that further clarification is unnecessary. Opp. at 11. In fact, what the pre-and-post-*Cipollone* decisions prove (including the decision in this case) is that *Cipollone* did *not* resolve the conflict among the lower courts. Indeed, in several instances since *Cipollone*, courts have expressly disagreed with the result reached in other cases. *See, e.g., MacDonald v. Monsanto Co.*, 813 F. Supp. 1258 (E.D.Tex. 1993), *appeal filed*, No. 93-4817 (5th Cir. May 11, 1993)(disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993)(Arkansas-Platte II)); *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992), slip. op. at 5 (disagreeing with *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992), *re-aff'd*, Arkansas-Platte II). *See also Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 933 n.2 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993) ("We do not find *Cipollone* instructive"); *The Supreme Court -- Leading Cases*, 106 Harv. L. Rev. 163, 355-357 (1992) ("[FIFRA] preemption decisions in the wake of *Cipollone* indicate the need for clarification."). In light of the wide-spread conflict, it is apparent that *Cipollone* did not provide the lower courts with sufficient guidance to resolve the FIFRA preemption question.

3. *The EPA Is Not Responsible For The Adequacy Of A Pesticide Label; Nor Does It Have The Resources To Take This Responsibility.*

Contrary to Zoecon's blatantly false assertion, Congress did not vest the EPA with "responsibility to devise appropriate warnings for each pesticide product." Opp. at 24. Rather, as the EPA has expressly noted, it is the registrant's responsibility to provide a label that adequately warns about the product. 53 Fed. Reg.15,956 (May 4, 1988)("*The registrant must take responsibility*

for quality control of the product's composition and *for adequate labeling* describing the product, its hazards and uses." (emphasis added)).[5]

Moreover, the EPA does not have the "necessary resources, expertise and experience, to determine what warnings a pesticide product's manufacturer should provide," as Zoecon contends. Opp. at 6. A recent report from the Inspector General of the EPA concluded, "EPA cannot provide the public with assurance that precautionary statements on many pesticide labels are adequate." *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992), at ii. The report also found that "[a]lmost half the pesticide labels evaluated had missing or inaccurate precautionary statements" and that "[o]ther pesticides were missing statements restricting usage of the pesticide to certified applicators." *Id.*

Plainly, the EPA has neither the responsibility nor the resources to draft adequate labels for the thousands of pesticides that are on the market. Knowing these deficiencies, Congress could not have intended to immunize manufacturers who evade this responsibility from liability for injuries that result from inadequate labeling.[6]

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[5] As Zoecon concedes, the regulations show that the manufacturer is responsible for crafting the label and that the labeling regulations permit variations even among products containing the same active ingredients. Opp. at 7, 8 n.12. For this reason, Zoecon's equation of the words "uniform" with "identical" is misleading with respect to FIFRA labeling. *See* Opp. at 6.

[6] Zoecon's speculation that, had the EPA been informed of the presence of benzene in Zoecon's product, the agency would not have required Zoecon to disclose this fact to the Papases only reinforces the Papases' contention that the EPA's regulation of pesticides is woefully inadequate and was never intended by Congress to immunize manufacturers from liability for labeling deficiencies. *See* Opp. at 9.

4. *Zoecon's Factual Allegations Are Unsupported By The Record Evidence And Irrelevant At This Stage Of The Proceedings.*

Zoecon concedes at the outset of its brief that, "No trial has been held in this case." Opp. at 2. Nevertheless, relying on innuendo and factual allegations that are wholly unsupported by the record evidence in this case, Zoecon urges this Court to ignore the unjust outcome that will result if the lower court's opinion is permitted to stand.[7]

For example, contrary to Zoecon's contention, the record evidence is that the amount of benzene allegedly present in its product was not "toxicologically insignificant."[8] Opp. at 9. More importantly, for purposes of deciding the FIFRA preemption issue, the lower courts accepted the Papases' allegation that Mr. Papas is suffering from a benzene induced illness that was caused by an inert ingredient in Zoecon's product.[9] *See* Pet. App. at 36a.

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[7] Some of these allegations are truly astounding. For example, Zoecon's suggestion that Mr. Papas suffered benzene poisoning because he failed to follow the label warnings completely ignores that Zoecon's label failed to advise Mr. Papas that the product contained benzene. *See* Opp. at 3.

[8] In fact, the only knowledgeable witness to testify on this matter pointed out that the quantity of benzene was several hundred times the so-called "safe limit."

[9] Petitioners attempted to amend the complaint to add the manufacturer of the inert ingredient to the litigation, but the district court did not permit the joinder because, in its view, the claims against the manufacturer included failure to warn claims that are likely preempted. *See* Pet. App. at 31a. The separate suit, referenced in Zoecon's brief at 3 n.4, was filed to avoid the arguable running of the statute of limitations. The suit has been stayed by the same district judge presiding over this case, pending the instant appellate proceedings' resolution.

Accordingly, these are the allegations which this Court should accept for purposes of deciding the Papases' petition for *certiorari*.

CONCLUSION

This Court should grant the Petition For A Writ of *Certiorari*.

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No. 92-1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MINAS H. PAPAS, *et al.*,

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ZOECON CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENT ZOECON CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENT ZOECON CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15.7, Respondent Zoecon Corp.[1] is hereby supplementing its opposition to the petition for a writ of certiorari by advising the Court that on September 15, 1993, the U.S. Court of Appeals for the Fourth Circuit joined the First, Seventh, Tenth and Eleventh Circuits in holding in light of this Court's opinion in *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992), that § 136v(b) of FIFRA "dictates

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[1] Parent companies and subsidiaries of Zoecon were identified in its Brief in Opposition, filed July 29, 1993.

the preemption of any state common law cause of action that rests on an alleged failure to warn or communicate information about a product through its labeling." *Worm v. American Cyanamid Co.*, ___ F.2d ___, No. 93-1003, App. at 6a (4th Cir. Sept. 15, 1993) ("*Worm II*") (text of opinion appended). Explaining that the Supreme Court in *Cipollone* "[a]rticulat[ed] a specific approach to interpreting a statute that expressly addresses preemption," the Fourth Circuit held "[t]hat restrictive analysis would appear to require no change in the [Fourth Circuit's] analysis of *Worm I*." App. at 5a-6a. In *Worm I*, decided five days prior to *Cipollone*, the Fourth Circuit held that the "language of § 136v(b) manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA." *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992) ("*Worm I*").

In *Worm II*, which affirmed the district court's opinion on remand, the court of appeals held that "[t]o the extent that the [appellants'] claims challenge, by whatever state cause of action, the adequacy of information provided by [the pesticide manufacturer] on its labeling, the claims are preempted by FIFRA." App. at 9a. The court found that the appellants' "argument that their state law claims are based on duties not inconsistent with those imposed by FIFRA has no merit." *Id.* at 7a. In addition, the court rejected the appellants' contention that their failure to warn claims are not preempted because the pesticide manufacturer, even if it "could not add language to its label . . . could comply with any common law duty

through statements made in other ways, for example through point-of-sale notices." *Id.* at 8a.

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES T. WORM, SR.; JAMES T. WORM, JR.; ROBERT C. WORM, d/b/a Worm Brothers, d/b/a Jim Bob Farms, Copartners,

Plaintiffs-Appellants,

v.

AMERICAN CYANAMID COMPANY, a body corporate of the State of Maine,

Defendant-Appellee,

and

SOUTHERN STATES COOPERATIVE, INCORPORATED, d/b/a Southern States Cooperative, Incorporated - Preston Service, a body corporate of the State of Virginia; SOUTHERN STATES PRESTON COOPERATIVE, INCORPORATED, a body corporate of the State of Virginia,

Defendants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,

Amicus Curiae.

No. 93-1003

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
John R. Hargrove, District Judge.
(CA-90-1424-HAR)

Argued: June 10, 1993

Decided: September 15, 1993

Before WIDENER and NIEMEYER, Circuit Judges, and G. Ross ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener and Judge Anderson joined.

COUNSEL

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OPINION

NIEMEYER, Circuit Judge:

In *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992) (*Worm I*), we held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, does not, expressly or by implication, preempt the field of pesticide regulation or a more narrowly defined field, but it does preempt conflicting state law causes of action that impose a duty to provide a warning in addition to or different from federally established labeling requirements. We remanded this case to the district court for individual consideration of the plaintiffs' state law claims to determine whether they were pre-empted under the principles set forth in our ruling. On remand, the district court entered summary judgment in favor of the defendant, holding that the plaintiffs' common law claims were either preempted

or unsupported by evidence sufficient to warrant proceeding to trial. This second appeal followed, and we now affirm.

I

James T. Worm, Sr., James T. Worm, Jr., and Robert C. Worm own a commercial farm in Caroline County, Maryland. In early 1987 they purchased a herbicide manufactured by American Cyanamid Company, known as "Scepter," for use on a soybean crop. The Scepter label, which had been approved by the Environmental Protection Agency (EPA) as required by FIFRA, and other promotional materials developed by American Cyanamid stated that corn could be safely planted 11 months after application of the Scepter herbicide. The Worms applied Scepter to 114 acres planted with soybeans in April and May 1987. About a year later, in May 1988, they planted sweet corn on 74 of the 114 acres.

The corn did not do well and ultimately had to be plowed under. The Worms claimed that the crop's failure was due to a "carryover effect" of Scepter. Although 11 months had passed since its application, Scepter, they contend, was still present in the soil and damaged the corn. While American Cyanamid denies that Scepter caused the damage to the Worms' corn, it has since acknowledged the possibility that the herbicide has a carryover effect beyond 11 months in drought conditions such as those that occurred in Maryland in 1987. In 1988 American Cyanamid placed an advertisement in the November edition of *Farm Journal* entitled, "How We're Handling the Scepter Carryover Problem," and prepared two brochures, "Drought '88: Tough Questions and Honest Answers About Scepter Herbicide Carryover," and "Statement on Scepter Carryover." It also distributed informational videotapes discussing the problem and the company's response to it. About the same time American Cyanamid submitted to the EPA a revised label addressing the risk of a more prolonged carryover of Scepter under drought conditions.

The Worms filed suit in state court, alleging five counts based on state law. In Count I they alleged (1) negligent failure to test and formulate Scepter adequately, (2) negligent manufacture of Scepter because it did not conform with announced specifications and formulations, (3) negligent marketing of Scepter because American Cya-

namid knew or should have known that the directions for use in crop rotation were inaccurate, and (4) negligent failure to warn that it was not safe to plant sweet corn 11 months after Scepter's application. In Counts II, III, and IV the Worms alleged breach of express and implied warranties that corn could be planted safely 11 months after Scepter's application. In Count V they alleged strict liability for marketing Scepter in a defective condition due to inadequate warnings. After American Cyanamid removed the action to federal court, it filed a motion for summary judgment, arguing that the Worms' claims were preempted by FIFRA and the EPA's approval of the Scepter label. The district court agreed and dismissed all the state law claims, concluding categorically that they were preempted.

After we vacated that judgment in *Worm I*, remanding the case for individual consideration of the state claims to determine whether they were preempted, the district court reviewed the complaint and the record in light of our ruling. On Count I (alleging negligence) it found that the allegations of negligent testing, formulating, and manufacturing were not supported with "sufficient admissible evidence to create a genuine dispute of material fact" and therefore entered summary judgment on those claims in favor of American Cyanamid. The remaining allegations of negligence, it concluded, were "directed at the representations made on the Scepter label, or in the materials accompanying the product" and were therefore preempted by FIFRA. On Counts II, III, and IV (alleging breach of express and implied warranties) the court concluded that these claims were based only on Scepter's labeling materials and were therefore preempted. Finally, on Count V (alleging strict liability) the court noted that the Worms did not claim that a defect existed in the product itself, but only that "American Cyanamid's failure to provide an adequate warning of [Scepter's] carryover effects rendered it an unreasonably dangerous product." Because the claim was based on alleged inadequacies of an EPA-approved label, the court concluded that that claim, too, was preempted.

II

The Worms, urging a most narrow interpretation of FIFRA's preemptive scope, contend that (1) because American Cyanamid was free to provide warnings that would have prevented the Worms' crop fail-

ure and because FIFRA does not prohibit it from providing those voluntary warnings, a claim for damage caused by American Cyanamid's failure to provide the warning is not preempted; (2) the inadequacy of the labeling of Scepter that formed the basis for the Worms' common law claims alleging a failure to warn and breach of warranty also constitute a violation of FIFRA and therefore those claims are not inconsistent with and preempted by FIFRA; and (3) by reason of the Supreme Court's recent decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), breach of warranty claims based on representations *voluntarily* made are not preempted.

In approaching these issues we begin with a review of our holding in *Worm I*, which construed the preemptive scope of FIFRA, 7 U.S.C. § 136v(b). Section 136v(b) provides that a state may not "impose or continue in effect any requirements for labeling or packaging [herbicides] *in addition to or different from* those required under this subchapter" (emphasis added). In *Worm I* we held that the "language of § 136v(b) manifestly ordains the preemption of the establishment or enforcement of any common law duty that would impose a labeling requirement inconsistent with those established by FIFRA." 970 F.2d at 1308. Thus we noted that if to comply with state law a manufacturer must violate federal law, the state law must yield. State law must similarly yield "if in complying with it, [a manufacturer] would be frustrating the objectives and purposes of federal law." *Id* at 1306. The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform regulation of the labeling, sale, and use of pesticides in both intrastate and interstate commerce. *Id.* at 1305.

Five days after we decided *Worm I*, the Supreme Court decided *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992),[1] in which the Court considered the preemptive scope of the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969, two statutes that also contain explicit language addressing the preemptive scope of their labeling requirements. Articulating a specific approach to interpreting a statute that expressly

[1]*Worm I* was decided on June 19, 1992, and *Cipollone* on June 24, 1992.

addresses preemption, the Court limited the task to first determining whether the relevant provisions reliably indicate congressional intent with regard to preemption of state authority, and second, if so, to interpreting the express language. 112 S. Ct. at 2618. That restrictive analysis would appear to require no change in the analysis of *Worm I* and the Worms do not argue that our conclusions in *Worm I* were incorrect or inconsistent with *Cipollone*. Instead, they argue that § 136v(b) must be applied sufficiently narrowly to assure the continuing vitality of state common law actions based on a failure to warn that are not inconsistent with the warning requirements of FIFRA.

A review of what FIFRA does require reveals the establishment of an involved process of review by the EPA, culminating in approval of the label under which a product may be marketed. FIFRA requires manufacturers to submit draft language addressing a number of different topics, including ingredients, directions for use, and adverse effects of the products. 7 U.S.C. § 136a(c); 40 C.F.R. § 152.50 & pt. 156. A final label must be submitted to the EPA prior to registration. 40 C.F.R. § 156.10(a)(6). All but the most technical changes require a manufacturer either to submit an application for an amended registration or notify the agency, which may determine that an application is required. *See id.* § 152.44 & .46. In addition, it is a violation of FIFRA for any person to alter, in whole or in part, any required labeling. 7 U.S.C. § 136j(a)(2). Given the comprehensive nature of the FIFRA labeling process, it is apparent that § 136v(b), prohibiting any state requirement in addition to or different from the federal requirements, dictates the preemption of any state common law cause of action that rests on an alleged failure to warn or communicate information about a product through its labeling. Claims for negligent testing, manufacturing, and formulating, on the other hand, are not preempted. The line between a claim for mislabeling and a claim for a defective product may not always be clear. If Scepter, for example, had been formulated to remain only 11 months in the soil and in fact it remained 15 months, would the deficiency be a misrepresentation of the label or a defect in the product? While the hypothetical is selected to blur the distinction, the issue may nevertheless be resolved by looking to, as one factor, whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label.

In this case the answer is more readily ascertainable. The Worms never maintained, beyond the conclusory allegations of the complaint, that the product itself functioned improperly or that the company was negligent in its manufacture or testing. As contained in the opening sentence of their brief on appeal, the Worms state that they "seek damages for the failure of their sweet corn crop *caused by the defendant American Cyanamid Company's false representation that they could safely grow corn eleven months after applying the herbicide Scepter*" (emphasis added). The only representations advanced in the record were those made on labels and literature distributed with the herbicide. To the extent that the Worms challenge the adequacy of the warnings on the labeling, their claims are preempted, as we held in *Worm I*.

The Worms' argument that their state law claims are based on duties not inconsistent with those imposed by FIFRA has no merit. Because the language on the label was determined by the EPA to comply with the federal standards, to argue that the warnings on the label are inadequate is to seek to hold the label to a standard different from the federal one. Nor does it make any difference that the standard the Worms seek to apply is one imposed by the common law rather than by positive legislative or executive enactment. Any distinction between the two is "illusory." *Worm I*, 970 F.2d at 1307.[2]

If a state elects to recognize that a breach of a FIFRA- created duty forms the basis for a state remedy, we have held that it is permitted to do so by 7 U.S.C. § 136v(b). *Worm I*, 970 F.2d at 1308. Allowing such actions, however, is substantially distinguishable from accepting the argument that the state common law duty to warn is not "in addition to or different from" the federally defined duty. *Cf. Moss v. Parks*

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[2]We additionally note that in interpreting the language of the 1969 Cigarette Act, which provides that "no requirement or prohibition based on smoking and health shall be imposed under State law," Justice Stevens similarly concluded that common law duties fall within the scope of "requirements." *Cipollone*, 112 S. Ct. at 2620 (plurality opinion). While Justice Stevens was writing only for a plurality of four, Justice Scalia, joined by Justice Thomas, also agreed with this conclusion. 112 S. Ct. at 2634 (Scalia, J., concurring in the judgment in part and dissenting in part).

Corp., 985 F.2d 736, 741-42 (4th Cir. 1993) (considering actions related to warnings required under the Federal Hazardous Substances Act). The other circuit courts that have considered FIFRA preemption in the wake of *Cipollone* and after our decision in *Worm I* have all concluded similarly that common law causes of action alleging that the language of an EPA approved label failed to adequately warn of risks associated with a pesticide are preempted. *See King v. E.I. DuPont de Nemours and Co.*, 1993 U.S. App. LEXIS 16809, *11 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993) (*Papas II*), *pet. for cert. filed*, June 7, 1993; *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993) (*Arkansas-Platte II*), *pet. for cert. filed*, May 10, 1993.

The Worms also argue that even if American Cyanamid could not add language to its label, it could comply with any common law duty through statements made in other ways, for example through point-of-sale notices. To allow the Worms to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language. *See Papas II*, 985 F.2d at 519.

Finally, the Worms contend that American Cyanamid could voluntarily make additional disclosures and representations about Scepter and that it in fact did so when it modified its label to state that in drought conditions Scepter may have a greater carryover effect. They argue that American Cyanamid's failure to make a voluntary disclosure earlier and its breach of express warranties regarding Scepter's carryover effect fall in the range of voluntary conduct found not preempted by *Cipollone*. Relying on *Cipollone*, they argue that "a federally mandated warning does not preempt a state law remedy for breach of a contractual commitment that is voluntarily undertaken." *See Cipollone*, 112 S. Ct. at 2622 (stating that although the preemptive provision of the Public Health Cigarette Smoking Act of 1969 prohibits additional requirements, "a contractual commitment voluntarily undertaken" is not preempted) (plurality opinion).

This argument, however, fails to recognize that American Cyanamid's inclusion on its label of the information that corn could be

safely planted 11 months following application of Scepter was not voluntary. Such statements concerning rotational crop use are expressly required by the regulations adopted under FIFRA. *See* 40 C.F.R. § 156.10(i)(2)(x)(B). Moreover, this argument also suggests that what was approved by the EPA was inadequate for purposes of establishing a state cause of action. Because the Worms point to no statement made by American Cyanamid other than that required and approved by the EPA, their warranty claims are preempted.

To the extent that the Worms' claims challenge, by whatever state cause of action, the adequacy of information provided by American Cyanamid on its labeling, the claims are preempted by FIFRA. The Worms did, however, also allege in their complaint state law claims for negligent testing, formulation, and manufacture which would not be preempted. But in connection with those claims, the district court entered summary judgment because the evidence advanced to establish the claims was insufficient to require a trial. Our review of the record confirms the district court's ruling.

III

Finally, the Worms contend that the district court erred in denying their motion for additional discovery after the case was remanded. By letter dated August 1, 1992, the Worms wrote the district judge requesting an additional eight months of discovery to review testing data and to supplement their initial responses. American Cyanamid opposed this request and, on August 5, 1992, renewed its motion for summary judgment filed January 15, 1991. The district court determined that "ample time to conduct discovery" had been provided to the parties, denied the additional request for discovery, and proceeded to rule on the motion for summary judgment.

In considering a motion for summary judgment, under Federal Rule of Civil Procedure 56(c), a court must provide "adequate time for discovery" to a party that has failed to show the existence of a genuine issue of material fact before granting the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this case the records appear to confirm that adequate time was provided. After American Cyanamid filed its answer in the district court, the court, by order dated June 19, 1990, established dates for completing discovery and filing

motions for summary judgment of October 15 and November 5, 1990, respectively. Pursuant to a joint motion of the parties, the court extended these dates to December 21, 1990, and January 15, 1991, respectively. On January 15, 1991, American Cyanamid filed its motion for summary judgment and the Worms thereafter responded. While the motion was pending, the court held a pretrial conference at which it scheduled a trial date. At no time, to our knowledge, after the cut-off of discovery, at the pretrial conference, or in the papers addressing the motion for summary judgment, did the Worms complain about the need for further discovery.

It is well established that management of discovery is a matter that is within the discretion of the district court. *See Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir. 1988). Our review of the record in this case reveals no abuse of that discretion.

For the reasons given the judgment of the district court is affirmed.

AFFIRMED